PROCEEDINGS AND ORDERS DATE: [02/11/92]

CASE NBR: [91100716] EOM STATUS: [DECIDED]
SHORT TITLE: [Blodgett, In Re James]
VERSUS [ ] DATE DOCKETED: [102591]
PAGE: [01]

~~~~~~~~DATE~~~~NOTE~~~~~~~~~~~~~~~~~~~~PROCEEDINGS & ORDERS~~~~~~~~~~~~~~~~~~~~~~

1	Oct 25 1991	D	Petition for writ of mandamus filed.
4	Nov 21 1991	X	Brief of respondent Charles Rodman Campbell in opposition filed.
		*	Motion and Form 4 affidavit requested, 11/26/91.
2	Nov 22 1991		Brief of respondent in opposition filed.
5	Nov 25 1991	X	Brief amicus curiae of State of Washington filed.
3	Nov 26 1991		DISTRIBUTED. December 13, 1991
7	Dec 16 1991	G	Motion of respondent for leave to proceed in forma pauperis filed.
8	Dec 16 1991		Brief of respondent Charles Rodman Campbell in opposition to amicus brief filed by the state of Washington filed.
9	Jan 3 1992		REDISTRIBUTED. January 10, 1992
10	Jan 13 1992		Motion of respondent for leave to proceed in forma pauperis GRANTED.
11	Jan 13 1992		Petition DENIED. Concurring opinion by Justice Stevens

PREVIOUS 1 1 EXIT

Last page of docket
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PROCEEDINGS AND ORDERS DATE: [02/11/92]

CASE NBR: [91100716] EOM STATUS: [DECIDED]
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11	Jan 13 1992		Petition DENIED. Concurring opinion by Justice Stevens with whom Justice Blackmun joins. Opinion per curiam.

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91-716

NO. _____

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1991

In re JAMES BLODGETT, Superintendent of Washington State Penitentiary, Walla Walla, Washington and KENNETH O. EIKENBERRY, Attorney General of the State of Washington,

Petitioners,

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND TO THE HONORABLE PROCTOR HUG, JR., CECIL POOLE, AND CYNTHIA HOLCOMB HALL, CIRCUIT JUDGES.

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QUESTION PRESENTED

Whether mandamus should issue to the United States Court of Appeals for the Ninth Circuit compelling that court to decide the appeal of the denial of a second capital habeas petition when: (1) the appeal was briefed and argued more than two years ago; (2) the circuit court has withdrawn the appeal from consideration without cause; (3) the circuit court has directed the prisoner to file yet a third federal habeas petition in violation of this Court's decision in *McCleskey v. Zant;*[1] and (4) the circuit court has issued an indefinite stay of execution in the absence of substantial grounds upon which relief might be granted.

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[1] ___ U.S. ___, 111 S. Ct. 1454 (1991).

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IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1991

In re JAMES BLODGETT, Superintendent of Washington State Penitentiary, Walla Walla, Washington and KENNETH O. EIKENBERRY, Attorney General of the State of Washington,
Petitioners,

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND TO THE HONORABLE PROCTOR HUG, JR., CECIL POOLE, AND CYNTHIA HOLCOMB HALL, CIRCUIT JUDGES.

The Petitioners herein respectfully pray that, pursuant to 28 U.S.C. § 1651(a), the All Writs Act, a Writ of Mandamus be issued in *Campbell v. Blodgett,* No. 89-35210, to compel the United States Court of Appeals for the Ninth Circuit, the Honorable Proctor Hug, Jr., Cecil Poole, and Cynthia Holcomb Hall, Circuit Judges, to decide the second appeal of a capital habeas corpus petition which has been pending in that court for over two years and to vacate an order which indefinitely postponed decision in the second capital habeas petition, directed the prisoner to file a third habeas corpus petition and indefinitely stayed the execution despite the absence of substantial grounds to do so.[2]

[2]Petitioners and Charles R. Campbell constitute all of the parties to the underlying appeal.

I. OPINIONS BELOW

Charles R. Campbell, the party to the underlying appeal, is an inmate sentenced to death under the laws of the State of Washington. Over two years ago, on June 27, 1989, the United States Court of Appeals for the Ninth Circuit heard argument and submitted for decision Campbell's appeal of the denial of his second federal habeas corpus petition.[3] Since submission there has been no final opinion by the court in the *Campbell* case, only orders which indefinitely delay decision and grant Campbell an ongoing stay of execution.

The first such order was on February 21, 1991. Without ruling on any substantive aspect of the appeal, the circuit court panel entered an order withdrawing the case from submission. Expressing concern about a then pending personal restraint petition in the Washington Supreme Court[4], the circuit court directed counsel for the State and for Campbell to advise the court whether issues pending in the Ninth Circuit had been properly exhausted in the state and federal district court. *See* Appendix D; *see also Campbell v. Blodgett*, 927 F.2d 444 (9th Cir. 1991). Both parties responded to the circuit court's order and agreed that all matters pending before that court had been exhausted. Although the State requested resubmission of the case, the circuit court failed to resubmit the case for consideration.

On August 7, 1991, the panel inexplicably issued a sec-

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[3]Campbell's first habeas petition was denied. *See Campbell v. Kincheloe*, 829 F.2d 1453 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988). On March 27, 1989, the United States District Court for the Western District of Washington denied Charles R. Campbell's second request for federal habeas relief as well as his eleventh hour request for a stay of execution. *See* Appendix A. On March 28, 1989, the district court granted a certificate of probable cause limited to the stay of execution. *See* Appendix B. On March 28, 1989, the United States Court of Appeals for the Ninth Circuit granted the requested stay of execution. *See* Appendix C.

[4]A personal restraint petition is a state post-conviction proceeding authorized pursuant to Washington Rules of Appellate Procedure 16.3 through 16.15.

ond order which: (1) granted Campbell's motion to fire his attorneys; (2) denied Campbell's motion to withdraw three of the issues from his appeal; (3) directed Campbell to file a third petition for federal habeas relief with the district court by August 30, 1991;[5] (4) stayed all further proceedings on Campbell's undecided appeal pending consideration and decision by the district court of the third petition; and (5) effectively continued indefinitely the previously-granted stay of execution pending action on the proposed third habeas corpus petition. *See* Appendix E; *Campbell v. Blodgett*, 940 F.2d 549 (9th Cir. 1991).

II. JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C.§ 1651(a)[6] and United States Supreme Court Rule 20.1. This Court has jurisdiction over any decision of the Court of Appeals on Campbell's appeal pursuant to 28 U.S.C. § 1254.

III. STATEMENT OF THE CASE

A. Jurisdiction of the Courts Below.

The district court had jurisdiction over Campbell's federal habeas petition pursuant to 28 U.S.C. §§ 2241(a) and 2254.

The circuit court has jurisdiction over Campbell's appeal of the denial of the habeas corpus petition pursuant to 28 U.S.C. § 1291, although the Ninth Circuit has refused to exercise its jurisdiction and decide the appeal.

B. Facts of the Crime.

Charles Campbell's crimes were a brutish and savage

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[5]This deadline was extended by the circuit court to September 13, 1991, upon Campbell's *ex parte* motion. Petitioners are informed that Campbell has filed a third federal habeas petition with the district court, however, as of the date of the printing of this petition, the State has not yet been served nor ordered to respond to Campbell's petition.

[6]28 U.S.C. § 1651(a) states: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

display of revenge. Campbell viciously slashed and beat to death Renae Wicklund, her eight year old daughter Shannah Wicklund, and their neighbor, Barbara Hendrickson at the Wicklund home in Clearview, Washington, on April 14, 1982. Campbell slashed Renae's throat with a butcher knife, severing both carotid arteries, after inflicting extensive scalp, facial and abdominal injuries and strangulation. After her death, Renae's vaginal wall was torn in a jagged manner by a blunt instrument. Young Shannah sustained a seven and one-half inch laceration to her neck, nearly severing her head. Barbara Hendrickson's throat was similarly slashed.

At the time of the murders, Campbell was an inmate at a nearby work release facility for convictions stemming from a prior attack on Renae Wicklund. In December 1974, Campbell had assaulted and sodomized Renae at the same residence in which he later killed her. In the 1974 attack, Campbell held a knife to the throat of then one year old Shannah and threatened to harm her if Renae did not submit to his demands. After the attack, Renae ran next door to Barbara Hendrickson's home for help. Both Renae and Barbara testified against Campbell at his 1976 trial at which he was convicted of first degree assault and rape.

Within days of the homicides, Campbell was charged in the Snohomish County Superior Court with three counts of aggravated first degree murder, and the State sought the death penalty. The State's case against Campbell was overwhelmingly strong, relying upon numerous witnesses and abundant evidence linking Campbell to the crimes.

Campbell was convicted after a lengthy jury trial of three counts of Aggravated First Degree Murder pursuant to Chpt. 10.95 Revised Code of Washington. Four different aggravating circumstances were found beyond a reasonable doubt by the jury: (1) at the time of the murders Campbell was serving a term of imprisonment; (2) Campbell committed the murders in the course of a burglary; (3) Barbara Hendrickson's and Renae Wicklund's murders were related to their prior testimony against Campbell; and (4) Barbara

and Shannah were murdered to protect Campbell's identity. *See* RCW 10.95.020(2), (6)(a), (7), (9)(c).

After a special sentencing proceeding, the same jury found beyond a reasonable doubt that there were not sufficient mitigating circumstances to merit leniency. Campbell was subsequently sentenced to death on December 17, 1982.

C. **Procedural Background.**[7]

1. *First State Court Reviews*

The Washington Supreme Court affirmed Campbell's conviction and death sentence on direct appeal. *State v. Campbell*, 103 Wn.2d 1, 691 P.2d 929 (1984). On January 21, 1985, the first death warrant was issued by the Snohomish County Superior Court, setting the execution for March 29, 1985. The Washington Supreme Court stayed Campbell's execution pending the disposition of his petition for certiorari. On April 29, 1985, this Court denied Campbell's petition. *Campbell v. Washington*, 471 U.S. 1094 (1985).

A second death warrant was issued on May 17, 1985, setting Campbell's execution for July 25, 1985. Appointed counsel sought relief in the Washington Supreme Court and on July 18, 1985, that court issued an unpublished order denying the petition on the merits.

2. *First Federal Habeas Petition*

Campbell filed his first federal habeas corpus petition in the United States District Court for the Western District of Washington on July 22, 1985, and he was granted a stay of execution. In his petition, Campbell raised sixty-one issues, forty of which had not been exhausted in state court. Campbell elected to amend his petition, limiting it to the twenty-one exhausted issues. The district court denied Campbell's petition on February 12, 1986.

Campbell appealed the district court's denial of his petition to the Ninth Circuit on February 18, 1986. Some 20

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[7]The following chronology of this case is summarized, in part, from *State v. Campbell*, 103 Wn.2d 1, 691 P.2d 929 (1984), *cert. denied* 471 U.S. 1094 (1985); *State v. Campbell*, 112 Wn.2d 186, 770 P.2d 620 (1989), and the district court's Order of March 27, 1989 (Appendix A, at p. 1.).

months later, on October 6, 1987, the Ninth Circuit affirmed the district court's denial of the writ. *Campbell v. Kincheloe*, 829 F.2d 1453 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988).

3. *Further State Court Collateral Review*

A third death warrant was issued by the trial court on February 15, 1989, scheduling Campbell's execution for March 30, 1989. On March 3, 1989, Campbell again sought relief in the Washington Supreme Court. He first requested a stay of execution, and, on March 7, 1989, filed a notice of appeal to the Washington Supreme Court, seeking review of the trial court's order setting his execution date. The State court appointed two attorneys for Campbell.[8] On March 23, 1989, after briefing and arguments, the Washington Supreme Court rejected, in a 9-0 decision, Campbell's challenges to the trial court's order. *State v. Campbell*, 112 Wn.2d 186, 770 P.2d 620 (1989). In an unpublished order, the court also denied Campbell's second personal restraint petition and motion for stay of execution.

4. *Second Federal Habeas Petition*

Campbell filed a second federal habeas corpus petition, as well as a motion for a stay of execution, with the United States District Court for the Western District of Washington on March 27, 1989. The district court denied Campbell's petition and his motion for a stay of execution.[9] On March 28, 1989, Campbell appealed the denial of the petition to the Ninth Circuit, raising eleven issues. On that same day, the

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[8]These same two attorneys represented Campbell in the district court and on appeal of the denial of his second federal habeas petition until terminated by the circuit court's August 7, 1991, order.

[9]An evidentiary hearing was conducted on that same date before John C. Coughenour, presiding, the same judge who had presided over Campbell's original petition. Campbell was present and represented by the same counsel as in his then most recent state court proceedings. The district court also granted a certificate of probable cause limited to the denial of the stay of execution.

Ninth Circuit granted Campbell a stay of execution pending appeal. The appeal was retained by the panel that granted the stay, and the case was fully briefed on an expedited basis. The court heard oral argument on June 27, 1989, and submitted the case for decision. After submission, the State twice wrote to the court requesting information regarding the status of the case. The first letter was dated April 30, 1990; the second October 5, 1990. The court did not respond to either letter. In the meantime, in July 1990 Campbell filed yet a third personal restraint petition in the Washington Supreme Court, raising further or renewed issues relating to his death sentence.

5. *Current Status Before the Ninth Circuit*

By order dated February 21, 1991, the Ninth Circuit panel withdrew Campbell's appeal from submission pending responses from counsel for the parties. *See* Appendix D. The circuit court noted that Campbell had filed a personal restraint petition in the Washington Supreme Court during the time period when Campbell's second appeal was under consideration by the circuit court. The panel directed the parties to advise it of the status of Campbell's pending state court petition and of "any other developments which might probably affect the continued vitality of the appeal." The panel expressed concern that all issues raised by Campbell in the pending appeal should be first ruled upon by the Washington Supreme Court. Thus, counsel were directed to address whether the issues pending on appeal were "exhausted." *Campbell v. Blodgett*, 927 F.2d 444 (9th Cir. 1991).

Counsel for both the State and Campbell timely responded and agreed that all issues pending on appeal had been exhausted. Campbell's attorneys informed the court "all of the issues in the appeal before this court have been raised and decided on the merits in the Washington State Supreme Court and in the federal district court." Subsequently, Campbell served notice on the Ninth Circuit that he intended to file yet a third habeas petition in federal court, presumably presenting those issues he had raised in

his third personal restraint petition in the Washington Supreme Court.

On March 21, 1991, the Washington Supreme Court again found no basis to grant relief to Campbell and dismissed his third personal restraint petition. The Washington Supreme Court found no basis to stay its decision pending action by the Ninth Circuit. Counsel for the State promptly advised the Ninth Circuit panel of the State court's decision dismissing the petition.

Despite the parties' responses to the circuit court's February 21 order and the dismissal of the pending State court petition, the Ninth Circuit again failed to act on Campbell's appeal. Rather than resubmit and promptly decide Campbell's appeal, or dismiss it as an abuse of the writ, pursuant to *McCleskey v. Zant*, ___ U.S. ___, 111 S. Ct. 1454 (1991), the case remained dormant for another six months. Then the court issued an order *sua sponte* on August 7, 1991, further delaying decision. The panel's order: (1) granted Campbell's previously-filed motion to fire his attorneys; (2) denied Campbell's motion to withdraw Issues III, IV, and V from his appeal; (3) inexplicably directed Campbell to file in the district court yet a third petition for federal habeas relief "in order to avoid a possible repetition of this piecemeal review"; (4) stayed further proceedings on the undecided appeal because "[a] ruling on that [third] petition could possibly obviate the need for further consideration of this appeal"; and (5) implicitly continued the previously entered stay of execution pending filing a decision on Campbell's third habeas petition. *See* Appendix E; *Campbell v. Blodgett*, 940 F.2d 549 (9th Cir. 1991). In entering its order the panel chose to accept Campbell's representation that he planned to litigate no further issues in State court. Thus, the panel reasoned that consolidation of issues presented in a third habeas petition, and any ensuing appeal, when combined with the currently pending appeal would avoid piecemeal litigation and resolve the "entirety of issues" for Campbell. The panel also reasoned that a decision on the merits of the appeal should be deferred so that "in the event

there is an appeal from the district court's ruling, that appeal [can] be consolidated with this appeal." *See* Appendix E.

IV. REASONS FOR GRANTING THE WRIT

A. Introduction.

Pursuant to 28 U.S.C. § 1651(a) and United States Supreme Court Rule 20.1, Petitioners Blodgett and Eikenberry now respectfully request this Court to issue a Writ of Mandamus directing the United States Court of Appeals for the Ninth Circuit, the Honorable Judges Hug, Poole, and Hall, to take two actions: (1) immediately, and within a time certain, render a decision in *Campbell v. Blodgett*, No. 8935210; and (2) vacate all or portions of the August 7th order. The writ should be issued in this case because the State can clearly and indisputably demonstrate that: (1) mandamus will protect this Court's prospective appellate (certiorari) jurisdiction over the Ninth Circuit's decision; (2) the Ninth Circuit's abdication of its responsibility to decide the Campbell case, as well as the procedural history of other death cases within the circuit, demonstrates exceptional circumstances warranting the exercise of this Court's discretionary power; and (3) the State cannot obtain adequate relief elsewhere.

The Supreme Court may issue writs of mandamus to inferior courts pursuant to 28 U.S.C.§ 1651, the All Writs Act. Although United States Supreme Court Rule 20.1 cautions that issuance of the writ is a matter of discretion sparingly exercised, the writ may be issued in the aid of this Court's appellate jurisdiction, which might otherwise be defeated. *Marbury v. Madison*, 1 Cranch 137 (1803); *Roche v. Evaporated Milk Assn.*, 319 U.S. 21 (1943); *F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 603 (1966). The authority of the Court to exercise mandamus extends to those cases that are within its appellate jurisdiction, although no appeal has yet been perfected. *Roche*, 319 U.S. at 25; *Dean Foods*, 384 U.S. at 603.

Mandamus is appropriate both to confine an inferior

court to the lawful exercise of its prescribed jurisdiction and to compel the court to exercise its authority when it has a duty to do so. *Roche*, 319 U.S. at 26; *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661 (1978). Unquestionably, only exceptional circumstances amounting to a judicial usurpation of power will justify the invocation of mandamus. *Will v. United States*, 389 U.S. 90, 95 (1967); *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 382-385 (1953). The party seeking mandamus has the burden of showing that the right to issuance of the writ is "clear and undisputable." *Bankers Life & Casualty Co. v. Holland*, 346 U.S. at 384; *Kerr v. United States Dist. Ct. for N. Dist. of Cal.*, 426 U.S. 394, 403 (1976).

While a writ of mandamus is inappropriate when the action challenged is within the judge's discretion, *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988), this Court has consistently recognized that mandamus remains appropriate when the Court has "clearly abused its discretion." *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957); *Mallard v. U.S. Dist. Ct. for S. Dist. of Iowa*, 490 U.S. 296 (1989). A determination regarding how long a decision may be delayed is subject to review for an abuse of discretion. *Chandler v. Judicial Council of Tenth Circuit of U.S.*, 398 U.S. 74 (1970).

Mandamus may be used only when the party requesting the writ has no other adequate remedy. *Kerr v. United States Dist. Ct. for N. Dist. of Cal.*, 426 U.S. at 403. It may not be used as a substitute for appeal. *Id.*

The Petitioners meet each of these criteria for issuance of a writ of mandamus to the Ninth Circuit. The default by the Ninth Circuit in its duty to decide the Campbell case is exceptional and merits relief. This Court offers the only available forum for redress of this abuse of discretion by the Ninth Circuit.

B. Issuance of a mandate will aid this Court in the exercise of its appellate jurisdiction.

In *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978), this Court expressly recognized its authority to issue a writ of

mandamus to compel an inferior court to decide a case:

> There can be no doubt that, where a district court persistently and without reason refuses to adjudicate a case properly before it, the court of appeals may issue the writ "in order that [it] may exercise the jurisdiction of review given by law."

Will v. Calvert, 437 U.S. at 661-662 (quoting *Insurance Co. v. Comstock*, 16 Wall. 258, 270 (1872)); *see also Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976).

Until the Ninth Circuit renders a decision in this case, this Court is deprived of the opportunity to exercise its powers to review the *Campbell* case by way of certiorari. The substance of Campbell's appeal lies unattended before the Ninth Circuit, offering neither party the opportunity for a final decision and final review by this Court. No order entered by the Ninth Circuit to date has been a final decision or judgment capable of review by way of certiorari. Only vacation of the order which indefinitely stayed decision of Campbell's appeal and a directive to the Ninth Circuit that the appeal be decided forthwith will allow this Court to exercise its review powers in a timely and meaningful fashion.

C. The *Campbell* case presents exceptional circumstances which warrant the issuance of a mandate directing the Ninth Circuit to decide the appeal immediately.

1. *The Ninth Circuit's avoidance of decision for two years, followed by its February 21 and August 7, 1991, orders which indefinitely postpone any decision and indefinitely continue a stay of execution, demonstrate the State's clear and indisputable right to relief.*

In March, 1989, a Ninth Circuit panel issued a stay of execution pending review by that court of the denial of Campbell's second federal habeas corpus petition. That stay was issued after the Washington Supreme Court had promptly considered and denied Campbell's renewed request for relief and the federal district court had disposed of the second habeas petition within a forty-eight hour time

period. While the Ninth Circuit appeared initially to expedite this successive petition, the case languished once submitted by the panel in June 1989.

Campbell, in the meantime, filed yet another post-conviction petition in the Washington Supreme Court, presenting that court with minor revisions of issues already reviewed by the state and federal courts and issues which had been available, but not raised, in earlier petitions. Now, over two years after the original submission of the case by the Ninth Circuit, the constitutionality of Campbell's conviction and sentence has received almost nine years of review, by numerous judges in five different state and federal courts, without a finding of constitutional infirmity—yet the inaction of one court has effectively precluded the State from finalizing this criminal adjudication.

In February 1991, the Ninth Circuit raised the spectre of lack of exhaustion as a basis for its indecision. Citing Campbell's latest post-conviction petition in the Washington Supreme Court as a cause for concern over whether pending issues on appeal were exhausted claims, the court withdrew the case from submission and demanded response from the parties. Counsel for the State and Campbell immediately informed the circuit court that all claims had been exhausted, and that the case was ripe for decision. The parties' undisputed exhaustion analysis had no effect on the panel. Six months passed without action or decision by the court.

Then, on August 7, 1991, the court found yet another basis to avoid a decision. The panel chose to accept Campbell's claim that he had some "last remaining issues in his case" in need of presentation to the federal district court. No longer concerned about whether the pending appellate issues were exhausted, as the panel had been in its February 21 order, the panel now concluded that avoidance of piecemeal litigation required a stay and continued inaction on the pending appeal until the federal district court considered and ruled upon Campbell's proposed third successive habeas corpus petition.

Implicit in the court's August 7 order is the conclusion that Campbell will actually file a third federal habeas corpus petition presenting the district court with issues previously presented in his Washington Supreme Court petition which was dismissed in March 1991. However, the circuit court did not preclude Campbell from filing even more claims in his third habeas review. The panel did not suggest that once an appeal of all these issues returned to the Ninth Circuit, Campbell could not attempt to repeat his journey through state and federal court. Rather, without benefit of argument or consideration of the substance of the issues Campbell might bring in his third petition, the panel indefinitely removed the case from submission and continued the stay of execution it had granted upon the appeal of the second habeas petition.[10]

Successive collateral reviews of a conviction not only extend and worsen the ordeal of trial for both society and the accused, such reviews also deprive criminal law of its deterrent effects. *McCleskey v. Zant, supra.* This Court in *McCleskey* summarized the toll exacted on society by continued re-examination of criminal convictions:

> Perpetual disrespect for the finality of convictions disparages the entire criminal justice system.
>
> "A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the underlying substantive commands * * * * There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility."

McCleskey v. Zant, 111 S. Ct. at 1469 (citation omitted).

The grant of jurisdiction to decide Campbell's appeal carries with it not an obligation to achieve ultimate and ab-

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[10]In a move certain to lead to further delays, the court also allowed Campbell to discharge his court-appointed attorneys, the seventh and eighth attorneys to have represented him since he was charged with three counts of aggravated first degree murder in 1982.

solute certitude in its decision, but rather a duty to decide the appeal:

> With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. *We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.*

Cohens v. Virginia, 6 Wheat. 264, 403 (1821) (emphasis added); *see also Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). A federal court's duty to render a decision applies equally to all habeas corpus petitions, including those involving the penalty of death. *Harris v. Nelson*, 394 U.S. 286, 29899 (1969); *see also Delo v. Stokes*, ___ U.S. ___, 110 S. Ct. 1880 (1990).

Moreover, in numerous recent cases, this Court has strongly criticized the delays, and resulting prejudice to the States, caused by abusive federal habeas corpus practice generally, and by second petitions in capital cases in particular. *McCleskey v. Zant, supra; Barefoot v. Estelle*, 463 U.S. 880 (1983); *Teague v. Lane*, 489 U.S. 288 (1989). As this Court reasoned in *McCleskey:*

> Finality [of State judgments] has special importance in the context of federal attack on a state conviction. *Murray v. Carrier*, 477 U.S., at 487; *Engle v. Isaac, supra*, 456 U.S., at 128. Reexamination of state convictions on federal habeas "frustrate[s] * * * 'both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'" *Murray v. Carrier, supra*, 477 U.S., at 487, (quoting *Engle, supra*, 456 U.S., at 128). Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but *the power of a state to pass laws means little if the state cannot enforce them.*

McCleskey, 111 S. Ct. at 1469 (emphasis added and parallel citations deleted). This Court has consistently acted to prevent delays and to uphold the finality of State judgments, by limiting the abuse of habeas procedures by State petitioners. *McCleskey, supra*. Furthermore, this Court has long cautioned lower federal courts that second and successive

federal habeas corpus petitions should be handled more expeditiously and with due regard to the States' legitimate interests:

> Second and successive federal habeas corpus petitions present a different issue. "To the extent that these involve the danger that a condemned inmate might attempt to use repeated petitions and appeals as a mere delaying tactic, the State has a quite legitimate interest in preventing such abuses of the writ."

Barefoot v. Estelle, 463 U.S. 880, 895 (1983) (citation omitted). This Court concluded that it was not only proper to expedite second and successive petitions, but that *"the granting of a stay should reflect the presence of substantial grounds upon which relief might be granted."* *Barefoot*, 463 U.S. at 895 (emphasis added); *see also Demosthenes v. Baal*, ___ U.S. ___, 110 S. Ct. 2223 (1990); *Delo v. Stokes, supra.*

More recently, this Court has made it clear that the inferior federal courts must not, by delay or improper issuance of stays in capital habeas cases, deprive States of the lawful process to which they are entitled:

> If the Court of Appeals fails to act in a manner sufficiently prompt to preserve the jurisdiction of the Court and to protect the parties from the consequences of a stay entered without an adequate basis, an injured party may seek relief in this Court pursuant to our jurisdiction under the All Writs Act, 28 U.S.C. § 1651.
>
> * * *
>
> *Delay or default by courts in the federal system must not be allowed to deprive parties, including States, of the lawful process to which they are entitled.* It is the duty of the Courts of Appeals to adopt and follow procedures which ensure all parties expeditious determinations with respect to any request for a stay. *Prompt review and determination is necessary to enable criminal processes to operate without undue interference from the federal courts, and to assure the proper functioning of the federal habeas procedure.*

Delo v. Stokes, 110 S. Ct. at 1882 (Kennedy, J., joined by the Chief Justice and Justice Scalia, concurring) (emphasis added). Indeed, this Court held that the courts of appeals

have a duty to ensure all parties an expeditious determination.

This Court's continued expression of these principles make the Ninth Circuit's lack of decision and continuation of an indefinite stay of execution pending the filing of a third habeas petition, indeed, exceptional. Continued lack of action by the Ninth Circuit on Campbell's appeal, compounded by the two recent orders directing further review and delay, has simply immobilized this case. Such procedural posturing by the Ninth Circuit reflects an anxiety on the part of the panel which apparently precludes the court from acting to allow the execution of the condemned killer.

This delay and default by the Ninth Circuit has deprived the State of all lawful process, all opportunity to be heard, contrary to the direction of this Court. *Delo v. Stokes*, 110 S. Ct. at 1882. The circuit court has substantially interfered with the criminal processes of the State of Washington, but has given the State no opportunity to influence or take exception to the decisions of the court. By the two-and-one-half year delay in this case, now to be extended well beyond that extraordinary time, the panel has violated its duty to make an expeditious determination of Campbell's appeal. As this Court held in *Delo v. Stokes*, *supra*, for a party injured by such a failure to act, mandamus is the appropriate relief. Because the panel has a nondiscretionary duty to decide Campbell's appeal, and have failed to do so, mandamus is the proper remedy. *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978).

These actions and inactions are not matters which fall within the broad range of judicial discretion. To the contrary, the operation of a complex judicial system and the even more complex interaction between federal habeas review and State judgments, demands efficiency and prompt review. *See generally, Chandler v. Judicial Council of Tenth Circuit of U.S.*, *supra*; *Delo v. Stokes*, *supra*. Through inordinate delay, and shifting rationale for such delay, the Ninth Circuit has abused its discretion. Mandamus is the appropriate remedy for such an abuse of discretion. *Mallard v.*

U.S. Dist. Ct. for S. Dist. of Iowa, 490 U.S. at 1822.

The extraordinary delay and default of the Ninth Circuit is cause enough for this Court to issue a writ of mandamus in the Campbell appeal. When such default is followed by action by the Ninth Circuit to grant a stay of execution in the absence of any grounds whatsoever, the case for mandamus becomes compelling. Even the briefest perusal of the February 21 and August 7 orders of the Ninth Circuit demonstrates that the court gave no consideration to the grounds proposed by Campbell for inclusion in his next habeas corpus petition. Rather than express concern as to whether such petition may constitute an abuse of the writ, the Ninth Circuit merely assumed the presence of legitimate issues warranting further habeas review by the district court. Such action by the Ninth Circuit is in flagrant disregard of the rule enunciated by the Court in *Barefoot v. Estelle* and *Delo v. Stokes*. A stay of execution pending disposition of a second or successive petition should be granted only when there are "substantial grounds upon which relief might be granted". *Delo v. Stokes*, 110 S. Ct. at 1881. In Campbell's appeal, a stay has been granted in the absence of any grounds whatsoever. As in *Demosthenes v. Baal, supra*, the Ninth Circuit failed to examine whether there was any basis for the exercise of its power. Thus, the exercise of federal power was done without an adequate basis, and relief by this Court is appropriate.[11]

The third petition invited by the circuit court on its face violates the rules set down in *McCleskey v. Zant*. Indefinite continuation of a decision on one appeal in order to allow an abusive and successive petition in the federal district court provides habeas litigants not just an incentive, but a verita-

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[11]Had the Ninth Circuit asked the parties to inform it of the basis for a continued stay of execution, the Court would have had to conclude that no such basis existed. The claims Campbell presented in his third personal restraint petition (and, presumably, the claims in his third habeas petition) concerned: (1) challenges to the trial court's penalty phase

ble roadmap as to how to withhold claims until the eleventh hour of review for the manipulative, dilatory purposes rightfully discredited in *McCleskey v. Zant*. Campbell has

instructions; (2) challenges to the prosecutor's penalty phase argument; (3) a challenge to the Washington death penalty statute; and (4) a claim that his death sentence was not and could not be reviewed for proportionality under state law. However, Campbell has already received a thorough federal review in his first habeas proceeding of claims concerning the prosecutor's penalty phase arguments and Washington's death penalty statute. *See Campbell v. Kincheloe*, 829 F.2d at 1457-61, 1464-66. His second habeas petition and appeal to the Ninth Circuit also challenged the Washington death penalty statute as well as the trial court's jury instructions. *See* Brief of Appellant, *Campbell v. Blodgett*, No. 89-35210 Issues III, IV, and V. Further, although Campbell has never presented the federal courts with a "meaningful proportionality review" claim, such a claim presents an issue of state law only and is therefore not cognizable in federal habeas corpus. *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984) (Eighth Amendment does not require proportionality review by state appellate courts).

Thus, the Ninth Circuit has effectively invited Campbell to engage in successive and abusive litigation. If Campbell's proposed third petition merely restates previously decided claims, the petition is successive. *See Sanders v. United States*, 373 U.S. 1, 15-17 (1963); 28 U.S.C. § 2254, Rule 9(b). If the petition presents new grounds that were available but not relied upon in Campbell's two prior petitions, it is an abuse of the writ. *See McCleskey v. Zant*, 111 S. Ct. at 1466-67 (1991); 28 U.S.C. § 2254, Rule 9(b). Campbell does not assert that there has been an intervening change in the law warranting the re-examination of his previous claims; neither has he demonstrated sufficient cause to excuse his failure to raise his proposed claims in an earlier petition and that he suffered actual prejudice as a result of the alleged trial errors. Campbell has never so much as hinted that he is actually innocent of the murders. By the same token, the Ninth Circuit did not require Campbell to make *any* type of preliminary factual or legal showing as a precondition to his filing a third ederal habeas petition; the court merely acquiesced to Campbell's naked demand for a further federal forum.

If *Barefoot v. Estelle, supra*, stands for any general proposition, it is that federal courts are to respect the interests of the States in the administration of their criminal justice systems and not to intervene in pending executions except in cases of arguable merit that cannot be decided before the scheduled execution. By indefinitely staying an execution while inviting a petitioner to file what is known will be an abusive and successive petition, the Ninth Circuit has blithely disregarded this Court's habeas corpus jurisprudence and trivialized the State's legitimate interests.

enlisted a truly cooperative partner in his efforts to delay the final execution of his criminal sentence. Through abdication of its duty to decide the *Campbell* appeal, the Ninth Circuit has not only unduly interfered with the State's efforts for thorough, yet final review of its criminal judgments, it has deprived the State of any forseeable finality to the ordeal of Campbell's crime, conviction, and appeal. Given the express direction of this Court in *Delo v. Stokes*, *supra*, that a court must expedite its decision on successive petitions, as well as this Court's condemnation of delay, as set forth in cases such as *McCleskey v. Zant*, *supra*, and *Barefoot v. Estelle*, *supra*, it is clear and indisputable that the Ninth Circuit has engaged in an exceptional pattern of action and has abused its discretion. The State has therefore met its burden to demonstrate that mandamus is the only appropriate remedy. *Kerr v. United States Dist. Ct. for N. Dist. of Cal.*, 426 U.S. 394 (1976).

2. *The Ninth Circuit's demonstrable pattern of delay in capital habeas cases also presents exceptional circumstances meriting relief by way of mandamus.*

Unfortunately, the *Campbell* case does not stand alone on the Ninth Circuit docket of delayed or undecided capital habeas cases. It is but one example of a familiar pattern of interference in the States' interest in carrying out their criminal sentences. In Campbell's case, the circuit court has, as it has in other death penalty cases, interposed itself between Campbell and the State's legitimate interest in carrying out the presumptively constitutional State court sentence.

The Petitioners first ask this Court to take judicial notice of the fact that there have been no contested post-*Gregg* executions within the Ninth Circuit. Only in those cases in which the prisoner has waived all appeals or post conviction challenges has the State been able to carry out the sentence. Indeed, even when the condemned intelligently and competently waives his right to pursue post conviction relief, the

Ninth Circuit has demonstrated its reluctance to allow a state to proceed with execution.

Illustrative of the circuit court's capital case jurisprudence is that of Thomas Baal, sentenced to death by the State of Nevada and who decided to forego further post-conviction appeals of his sentence. Despite presumptively correct and current factual determinations made by the State court that Baal was competent and sane, followed by review and a denial of a stay by the district court, the Ninth Circuit issued a stay of execution and ordered a full evidentiary hearing by the district court on the issue of Baal's competency. In ruling on the State's motion to vacate the circuit court's stay, this Court concluded that there was "no evidentiary basis" for such action by the Ninth Circuit and the exercise of federal power to stay the execution under such circumstances "was plainly lacking." *Demosthenes v. Baal*, 110 S. Ct. at 2226.

Also of note is the controlling Ninth Circuit abuse of the writ precedent. That case involved an eleventh hour second capital habeas petition and demonstrated the circuit court's proclivity to grant the habeas petitioner more process than is due, while granting the State none. *See Neuschafer v. Whitley*, 860 F.2d 1470 (9th Cir. 1988), *cert. denied sub. nom., Demosthenes v. Neuschafer*, ___ U.S. ___, 110 S. Ct. 264 (1989). In that case, the Ninth Circuit held as a matter of law that a successive petition can never be an abuse of the writ if it contains claims that were not exhausted when the previous federal habeas petitions had been filed.

In so holding, the *Neuschafer* court understood that as each round of federal habeas review is completed, the petitioner may return yet again to state court. Further, the court explicitly recognized that:

> This cycle may continue. Indeed, as each new execution date approaches, Neuschafer will have every incentive to think up new unexhausted claims in order to avoid the penalty which the jury imposed.

Id. 860 F.2d at 1477.

Thus, though recognizing the predictable abuses of the writ by capital petitioners its decision would encourage, the Ninth Circuit refused to affirm the district court which had found the petition to be an abuse of the writ, pursuant to the reasoning set forth by Justice O'Connor in her opinion in *Rose v. Lundy*, 455 U.S. 509, 520-21 (1982). *See*, *Neuschafer v. Whitley*, 674 F.Supp. 1418 (D.Nev. 1987). Instead, the Ninth Circuit provided capital habeas petitioners with a road map for avoiding executions through a never-ending series of meritless state-federal post-conviction proceedings.

However, few cases illustrate the Ninth Circuit's inability to reach an expeditious decision in second or successive habeas petitions than does that of Robert Alton Harris. Harris was sentenced to die by a California trial court in 1979. Following exhaustion of state remedies, Harris filed his first federal habeas petition March 5, 1982, which was denied by the district court. The Ninth Circuit reversed, holding that Harris had been denied a proportionality review by the California Supreme Court, a federal constitutional requirement in the opinion of the Ninth Circuit. The circuit court directed that the district court issue the writ unless the California Supreme Court reviewed Harris' sentence within 120 days. *Harris v. Pulley*, 692 F.2d 1189 (9th Cir. 1982). This Court reversed and remanded, ruling that the Constitution does not require that a state appellate court conduct a proportionality review of a death sentence. *Pulley v. Harris*, 465 U.S. 37 (1984).

Upon remand, the district court was directed by the Ninth Circuit to determine the remaining issues in Harris' first petition which were unaffected by this Court's decision. *Harris v. Pulley*, 726 F.2d 569 (9th Cir. 1984). Meanwhile, during the pendency of his first appeal, Harris had filed a second habeas petition in 1982. The district court consolidated that second petition with the remaining issues from the first petition and denied the consolidated petitions. Harris once again appealed to the Ninth Circuit, where the case was argued on November 5, 1986, submitted on June

29, 1988, and decided adversely to *Harris* on July 8, 1988. *Harris v. Pulley*, 852 F.2d 1546 (9th Cir. 1988). Fourteen months later, the circuit court amended its decision when it finally ruled on Harris' petition for rehearing, denying rehearing, and rehearing *en banc*. *Harris v. Pulley*, 885 F.2d 1354 (9th Cir. 1988). This Court also denied certiorari. *Harris v. Pulley*, ___ U.S. ___, 110 S. Ct. 854 (1990).

Undaunted, Harris then filed his third federal habeas petition on March 26, 1990, which was denied two days later by the district court. A single judge of the circuit court stayed Harris' then pending execution on March 30, 1990. *Harris v. Vasquez*, 901 F.2d 724 (9th Cir. 1990). The case was argued and submitted to the panel on May 14, decided on August 29, and amended November 19, 1990, the panel finding that Harris' third petition was barred as a delayed petition and as an abuse of the writ under 28 U.S.C. § 2254, Rules 9(a)and 9(b). *Harris v. Vasquez*, 913 F.2d 606 (9th Cir. 1990).

Harris filed a petition for rehearing on November 28, 1990. Two days later, Harris filed a request for remand and evidentiary hearing based upon "newly discovered evidence" pertaining to one of the claims in his third petition. The "newly discovered evidence" included revamped affidavits which had previously been submitted to the district court. The panel (the same panel that had earlier ruled that each of the claims in Harris' third petition was barred) granted Harris' request and deferred its decision on his petition for rehearing. *Harris v. Vasquez*, 928 F.2d 891 (9th Cir. 1991). On remand the district court conducted a hearing and found that the newly discovered evidence was not credible. On August 21, 1991, the panel issued a second amended opinion, reaffirming its earlier denial of Harris' third habeas petition. *Harris v. Vasquez*, ___ F.2d ___ (9th Cir. 1991).

The *Campbell* case mirrors each of these other cases in some critical respect. As in *Baal*, the *Campbell* panel has issued a stay of execution in the absence of any evidentiary basis. As in *Neuschafer*, the published orders in *Campbell*

provide habeas petitioners every incentive to hold back claims and create a tortured and complex procedural history to frustrate finality of their sentence. As in *Harris*, the delays and search for certitude by the circuit court, which offer the habeas petitioner every opportunity for a new hearing or a new argument, run rampant. Conspicuously lacking in each of these cases, including *Campbell*, is a respect for the needs of the States to enforce their criminal laws, and for the precedent established by this Court to dissuade such abuses.[12]

The procedural history of the *Campbell* case is egregious and exceptional standing alone. When viewed against the background of other capital cases in the Ninth Circuit which have come closest to an execution, it is evident that the court, specific panels, or individual judges are obstructing the States' efforts to enforce their laws. This is an exceptional situation, demanding extraordinary relief and direction by this Court as to the proper disposition of second and successive habeas petitions.

D. **The State has no other means to receive adequate relief from any other court.**

It is apparent that the lack of action by the Ninth Cir-

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[12]At least one Ninth Circuit judge has individually expressed opinions about the impropriety of the death penalty and his belief that state courts are unable to render criminal judgments that afford constitutional protections to defendants:

> Capital cases take a long time, the statistics show. Perhaps longer than justified. Why? Neither the report nor the statistics provide us with any useful information on this question. What do they tell us? Only that a large part of the time transpires while the case is pending in the Federal courts.
>
> Again, why? It is probably because there are so many constitutional errors committed in the State court proceedings that Federal courts proceed slowly and with commendable caution. And we would not want to change that. In some cases, the constitutional errors are manifold. The reversal rate in the Federal courts is extremely high, two-thirds during a recent 10-year period.

Habeas Corpus Reform: Hearings Before the Senate Committee on the Judiciary, 101st Cong., 1st Sess. 207 (1989) (testimony of Judge Stephen Reinhardt, U.S. Court of Appeals, Ninth Circuit).

cuit, as well as the issuance of non-final, unreviewable orders leave the State with no avenue for relief other than mandamus in the this Court. The Ninth Circuit has neither rendered a final decision nor decided any question of law which would allow the State Petitioners herein to seek review by certiorari. The panel has abdicated its duty to decide a fully briefed and argued case, ripe for decision, in favor of directing successive and abusive litigation regardless of the merits of such litigation. Only through this court's intervention, compelling the Ninth Circuit to decide the Campbell appeal, can there be an end to the Circuit Court's familiar practice of delay in capital habeas cases.

The Ninth Circuit's refusal to decide Campbell's appeal has obvious adverse effects on the State, as well as Campbell. The court's refusal to act directly, abrogates the State's strong interest in the finality of its criminal judgments. *Murray v. Carrier*, 477 U.S. 478 (1986); *McCleskey v. Zant*, *supra*. If the district court is reversed and Campbell's petition granted such that a new trial is necessary, then the present delay greatly prejudices the State in its ability to retry Campbell. *Kuhlmann v. Wilson*, 477 U.S. 436, 453 (1986); *McCleskey v. Zant*, *supra*. The delay diminishes the chance of a reliable criminal adjudication, which is the ultimate goal of federal habeas review. *Id*. Further, the effects of delay are a twoedged sword that can just as easily interfere with Campbell's ability to defend himself on retrial. *Barker v. Wingo*, 407 U.S. 514 (1972); *United States v. MacDonald*, 456 U.S. 1 (1982). The old saying that "justice delayed is justice denied" is grounded in fact and applicable to the *Campbell* case.[13]

A fundamental precept of federal habeas review is that the court will actually review the case before it. Until March 28, 1989, Campbell's conviction and death sentence

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[13]The Ninth Circuit itself has displayed concern for the rights of criminal defendants when a State delay in rendering decisions on appeals is measured in years rather than months. In *Coe v. Thurman*, 922 F.2d 528 (9th Cir. 1990), the court granted a writ of habeas corpus to force

had run the gauntlet of direct and collateral review in the State and federal courts, with each court concluding after thoughtful review that Campbell received a fair trial and a just sentence. The Ninth Circuit's actions and inactions in Campbell's second habeas appeal are the antithesis of the judicial process because the circuit court, after waiting more than two years, has determined not to decide the case. The court's purposeful inactivity bespeaks a studied indifference to, even contempt for, the legitimate interests of the State and a preference for lengthy, redundant litigation. Petitioners respectfully request that this Court intervene and compel the Ninth Circuit panel to perform its proper, lawful function in this case.

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the California Court of Appeals to decide a delayed appeal from a criminal conviction. The court likened the delay to that in *Jarndyce v. Jarndyce*, the infamous case in Dickens' *Bleak House*, stating "we refuse to condone the otiose progression of this litigation." *Coe*, 922 F.2d at 532. However, it is the Ninth Circuit's own capital habeas practices that bear a stronger similarity to Dickens' parody. Indeed, in light of cases such as Campbell's, the Ninth Circuit appears to have exempted itself from its own reasoning in *Coe v. Thurman*.

V. CONCLUSION

For the reasons stated above, Petitioners respectfully pray that this Court grant their request for a Writ of Mandamus to the United States Court of Appeals for the Ninth Circuit, the Honorable Circuit Judges Hug, Poole, and Hall.

DATED this _____ day of October, 1991.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. C89-456C

ORDER ON MOTION FOR STAY OF EXECUTION
AND WRIT OF HABEAS CORPUS

CHARLES CAMPBELL,

Petitioner,

v.

JAMES BLODGETT, Superintendent of Washington State Penitentiary, P.O. Box 520, Walla Walla, WA 98362 and KENNETH EIKENBERRY, Attorney General for the State of Washington,

Respondents.

PROCEDURAL BACKGROUND

On December 17, 1982, Charles Campbell was sentenced to death for three counts of aggravated first degree murder. On November 6, 1984, the Washington Supreme Court affirmed the conviction. *State v. Campbell*, 103 Wn.2d 1, 691 P. 2d 929 (1984). On January 21, 1985 a death warrant was issued, setting an execution date of March 29, 1985. Campbell obtained a stay of execution pending action by the United States Supreme Court on his petition for certiorari. On April 29, 1985, the petition was denied.

On May 17, 1985 a second death warrant was issued, setting execution for July 25, 1985. On July 11, 1985, Campbell filed a motion for stay of execution. The Washington Supreme Court treated the motion as a personal restraint petition and dismissed the petition on July 18, 1985. On July 22, 1985 Campbell filed a habeas corpus petition and motion for stay of execution in this court. A stay was granted by the undersigned. Campbell raised 61 issues, 40 of which had not been exhausted in state court. Campbell amended his petition, limiting it to the remaining 21 issues rather than have his petition dismissed. This court consid-

ered those claims and held an evidentiary hearing on the allegation of ineffective assistance of counsel. On February 12, 1986 the petition was denied. Campbell appealed to the Ninth Circuit, which affirmed this court on October 6, 1987. *Campbell v. Kincheloe*, 829 F.2d 1453 (9th Cir. 1987). On May 27, 1988, the Ninth Circuit denied rehearing. On November 7, 1988 the U.S. Supreme Court denied certiorari. On January 25, 1989, the Ninth Circuit dissolved the stay of execution.

On February 15, 1989, a third death warrant was issued, setting the execution for March 30, 1989. On March 3, Campbell moved for a stay of execution. On March 23, the Washington Supreme Court denied the motion. On the issues of whether Campbell's choice of execution methods is cruel and unusual punishment, and whether he was obligated to complete previously imposed prison sentences before he could be executed, the court rejected his claims by a 9-0 majority. The remaining claims were rejected by a 7-2 majority.

This court held a status conference on March 24 to ascertain the timing of Campbell's federal petitions. Campbell filed a motion for stay of execution and writ of habeas corpus on March 27. An evidentiary hearing on the issues of absence from jury selection and ineffective assistance of counsel was held that same day.

MOTION FOR STAY OF EXECUTION AND PETITION FOR HABEAS CORPUS

A petitioner is entitled to a stay of execution upon a substantial showing of the denial of a federal right. *Barefoot v. Estella*, 463 U.S. 880, 893, 103 S. Ct. 3383, 3394 (1983). When the process of direct review is completed, it is presumed that the conviction and sentence are both final and legal. *Id.* at 887. The role of federal habeas proceedings is limited, and should not be used as a means to delay execution indefinitely. *Id.* Accordingly, this court finds that Campbell's challenges to his death sentence, with the exception of the claim regarding his absence from jury selection and ineffective assistance of counsel as a result of that ab-

sence, do not constitute a substantial showing of the denial of a federal right. If there was error, it was harmless. The record before the court indicates that further briefing of the legal issues or presentation of factual evidence would be redundant, serving only to confirm the court's conclusion. Campbell's motion for stay of execution is DENIED.

In disposing of the motion for a stay, this court may also consider the merits of the underlying petition if the parties are informed that their opportunity to fully brief an issue may be limited. *See Barefoot v. Estella*, 463 U.S. 880, 889-90, 103 S. Ct. 3383, 3392-93 (1983). The parties were notified that the court might adopt a summary disposition of the case at a hearing conducted March 24. They were also notified that Campbell's prior attorneys should be present because an evidentiary hearing on the issue of ineffective assistance of counsel might be held. Accordingly, the court has considered the issues of Campbell's absence from jury selection and ineffective assistance of counsel on the merits. Campbell's petition for writ of habeas corpus on these issues is DENIED.

I. CAMPBELL'S ABSENCE DURING JURY SELECTION

Campbell signed a waiver, prior to the commencement of his trial, that stated he was aware of his absolute right to be present during the selection of the jury, and that by signing the waiver he would be barred from challenging the composition of the jury. The trial judge informed Campbell that he would be barred from alleging that he had received ineffective assistance of counsel as a result of signing the waiver.

Under the law of this circuit, a defendant in a capital case cannot waive his right to be present in the courtroom during his trial. *Bustamante v. Eyman*, 456 F. 2d 269, 274 (9th Cir. 1972), on remand *sub. nom.*, *Bustamante v. Cardwell*, 497 F. 2d 556 (9th Cir. 1974). However, the conviction will stand if the prosecutor establishes, beyond a reasonable doubt, that the defendant's absence did not result in prejudice to the defendant. *Bustamante*, 497 F. 2d at 558. This

court finds that, based on the record before it, there is no reasonable doubt the Campbell was not prejudiced by his absence from jury selection.

Campbell mistakenly asserts that a defendant's absence during jury selection can never be harmless error. He relies on *United States v. Gordon,* 829 F. 2d 119 (D.C. Cir. 1987), *United States v. Crutcher,* 405 F. 2d 239, 243 (2nd Cir. 1968) and *United States v. Alessandrello,* 637 F. 2d 131 (3rd Cir. 1980) for that proposition. In those cases, there was no effective waiver by defendants. This court holds that, where there is knowing and voluntary waiver of the right to be present during jury selection, absence during that portion of the trial can be harmless error. *See Alessandrello,* 637 F. 2d at 14344, n. 23. ("* * * **without effective waiver** a defendant's absence from the entire jury selection process cannot be determined to constitute harmless error." Emphasis added.) Only where there is no knowing waiver, can there can be no harmless error.

This court rejects Campbell's contention that his waiver was not effective. The following colloquy between Judge Britt and Mr. Campbell illustrates that the waiver was knowing, intelligent, and voluntary:

> Q: Mr. Campbell, your attorney has said that you would prefer to remain in Snohomish County while we are selecting a jury in Spokane County. Is that right?
> A: Yes, it is.
> Q: Are you fully aware of the fact that you do have a right to be present while a jury is selected?
> A: I do.
> Q: I would assume it might be a constitutional right and, if my memory is correct, unless leave is granted by the court rules, the defendant must be present at all stages of the proceedings, unless he voluntarily absents himself or -- generally, along those lines. You do have a right to be present while a jury is being selected.
> A: I understand that.
> Q: And if you stay here and a jury is picked over there, you won't be present to hear the questions your attor-

ney asks of the jurors. You may hear those questions later and you may be of the opinion that you wished you had asked other questions. You will not be present to supply them with questions. Do you understand that?
A: Yes, I do.
Q: You may look at the jurors and say, "Those aren't the type of jurors I would have wanted my lawyers to pick if I had been there."
You would waive any right to have any input whatsoever in the jury selection process, other than what you can tell your attorneys ahead of time. Are you aware of that?
A: Yes, I am.
Q: And you are willing to submit the issues in this case, which may well be your guilt or innocence and may be your life or your death, to 12 people who you have no choice in selecting and no part in selecting and wish -- were not even present while they were selected?
A: Yes.
Q: You are still willing to waive your right to be present during the selection of the jurors?
A: I am.... I have alot of confidence in Mr. Mestel and Mr. Savage going over there. They do that for a living. I am trying to prepare myself for my part in the trial and I am trying to relax and get my head together. What I am doing ... I feel like going to Spokane will be a real inconvenience. It's going to be a long ride. I will be cut off from things over here. I will spend all day court, going through the kind of stuff. My time will be limited and I will not be able to prepare things I am working on right now. It is my decision to stay here in Snohomish County so that I can accomplish that.
Q: You mentioned something I had not thought of. While they are in Spokane and they are selecting a jury, you would be somewhat cut off from your attorneys. You wouldn't be with them all day or see them at night. I don't know how long jury selection may be. It

> may be a week, it may be longer, or it may be shorter. You would have limited contact with your attorneys during that period of time.
>
> A: I understand what you're saying. What I am talking about, I wouldn't have the opportunity that I need to be preparing myself in a relaxed atmosphere.

In addition, Campbell signed a written waiver that states:

> The defendant being advised that he has an absolute right to travel to Spokane and be present during the selection of the jury to sit in the guilt and penalty phase of this cause of action and mindful that by not attending the jury selection proceedings he will be forever precluded from challenging those persons impaneled by his counsel or from contesting its composition, knowingly, intelligently and voluntarily waives his right to be present to allow him to remain in Snohomish County to continue his preparation for trial.

The colloquy was more extensive than that recommended by the Ninth Circuit in cases where the a criminal defendant chooses to waive his right to a jury trial altogether. *See United States v. Cochran*, 770 F. 2d 850, 853 (1985). This court finds that the extent of the colloquy between Judge Britt and Campbell, and Campbell's intelligent responses to the Judge's inquiries, show that Campbell's waiver was knowing, voluntary, and intelligent. Therefore, it was effective.[1]

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[1]This court finds that Campbell's contention that Judge Britt based his decision to allow the waiver solely on administrative convenience by the state is without merit. Judge Britt stated,

> As indicated, he has things he feels are more important to do in preparing for his trial than to sit through jury selection. He has good cause.

Supplemental Verbatim Report of Proceedings, 22, 1982, at p.5.

This court rejects the contention that preparation for trial was not good cause under CrR 3.4. Further, the court cannot consider Campbell's contention that he had other, more compelling reasons for his choice to be absent that were not good cause, when Campbell declined to present

For the following reasons, this court finds that Campbell's federal rights were not violated by his absence: (1) absence from jury selection may be harmless error where the defendant has made an effective waiver of his right to be present; (2) Campbell's absence was not prejudicial; and (3) his waiver was effective, this court finds that Campbell's federal rights were not violated by his absence.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Campbell has not shown that his right to effective assistance of counsel was violated by his attorneys allowing him to waive his right to be present during the jury selection.[2] Further, he has not shown known prejudice as a result of their conduct. Although other counsel might have chosen a different course of action, Campbell's counsel was not rendered ineffective by heeding Campbell's wishes. Had the attorneys not supported Campbell's request for waiver, Campbell could have made the same allegation based on his lack of opportunity to prepare for trial. Campbell's attorney, Mark Mestel, testified at the evidentiary hearing that allowing Campbell to waive his presence was necessary to preserve a viable working relationship with his client. If he did not allow Campbell to make that choice, he anticipated that Campbell would be unwilling to assist him during the trial. Further, he believed that Campbell might be disrup-

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those reasons to the court at the time Judge Britt made his decision. Counsel's decision to not present those reasons on Campbell's behalf did not render his assistance of counsel ineffective because of the valid concern that not abiding by the defendant's wishes in this matter would make their working relationship untenable.

[2]At the proceeding in which the waiver was discussed, Campbell orally waived his right to later assert ineffectiveness of counsel. This, in effect, is a waiver of his right to effective assistance of counsel. Such a waiver may be effective only if a defendant has decided to proceed *pro se*. In that situation only may the right to effective assistance of counsel be waived, because it is superceded by the right to self-representation which arises from an independent source. *See United States v. Dolan*, 570 F.2d 1177, 1183 (3rd Cir. 1978).

tive during the proceedings if he were displeased. Mestel testified that his decision was tactical in that he sought to preserve a viable relationship with his client for the purpose of effectively representing him during his trial.

Tony Savage, Campbell's other counsel, did not participate in the decision. At the evidentiary hearing he testified that, when it was presented to him, he thought it was a good idea because it would mitigate the negative impact Campbell's presence would have on the prospective jurors. He testified that he thought that it would be to Campbell's advantage that the jurors had not seen him prior to taking the oath to decide the case fairly and dispassionately. Savage testified that at the time he was satisfied that the jurors selected on Campbell's behalf were capable of making a fair decision.

Both Mestel and Savage had extensive experience in felony criminal trials at the time of Campbell's trial. Savage was chosen as co-counsel by Mestel because of his distinguished reputation as a criminal lawyer. He has represented many defendants in capital cases in Washington. His competency is generally unquestioned in the legal community. Both attorneys testified that they were aware of the importance of a defendant's presence during voir dire, that they had never been in the situation of the defendant requesting to waive this right prior to Campbell's trial, and that they felt allowing Campbell to choose to be absent was appropriate under these very unique circumstances.

Judicial scrutiny of counsel's performance must be highly deferential. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065 (1984). This court finds that Mestel's decision to allow his client to waive his presence at jury selection falls well within the standards of competency set forth in Strickland. *Id.* at 687-88. It further finds, based on testimony presented at the evidentiary hearing, that counsels' conduct did not so undermine the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Id.* at 686, 2064.

Most importantly, although Campbell speculates that his absence during jury selection must have had a detrimental effect on his attorneys' ability to conduct voir dire, as well as a dehumanizing effect on the jury's perception of him, he has made no specific allegations about how he was prejudiced by the composition of the jury. An error by counsel does not warrant setting aside the judgment in a criminal proceeding if the error had no effect on the judgment. *Id.* at 695. Campbell has not established that the alleged error had any effect on his sentence.

A review of the record satisfied this court that Campbell's rights were not prejudiced by this absence from jury selection.

Because Campbell has shown neither that his counsel acted outside the range of professional competence, nor that prejudice resulted from this alleged defect, this court finds that Campbell's right to effective assistance of counsel was not violated.

III. ILLUSTRATIVE EXAMPLES OF MITIGATING FACTORS UNDER DEATH PENALTY AND THE CONSTITUTIONALITY OF WASHINGTON'S DEATH PENALTY STATUTE

Campbell has not made a substantial showing that the illustrative examples of mitigating circumstances given by the trial court during the sentencing phase of Campbell's trial violated his federal rights. He claims that the examples necessarily limited the factors that the jury could consider. If the examples had this effect, it would be harmless error in view of the fact that Campbell put on no mitigating evidence. Furthermore, this is, in effect, a claim that Washington's death penalty statute does not provide adequate guidelines to the jury. Campbell has made this claim to the court on a prior occasion and is barred from raising it again. *See Campbell v. Kincheloe*, 829 F. 2d 1453, 1466 (9th Cir. 1987).

Moreover, the Washington Supreme Court has considered the jury guidelines within the statute on three different occasions. In each instance it found that RCW 10.95.070

did not limit the mitigating factors, and that the guidelines were adequate. *See State v. Campbell*, 103 Wn.2d 1, 691 P. 2d 929, 944 (1984); *State v. Bartholomew*, 101 Wn.2d 631, 647, 683 P. 2d 1079, 1087 (1984) (curing the constitutional flaw by interpreting statute's consideration of "any relevant evidence" to mean mitigating evidence only); *State v. Rupe*, 101 Wn.2d 664, 709-10, 683 P. 2d 571, 593 (1984). The guidelines meet the constitutional standard of individualized consideration set forth in *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 2964-65 (1978).

Similarly, the recent Ninth Circuit opinion, *Adamson v. Ricketts*, 865 F. 2d 1011 (9th Cir. 1988), does not raise any question of the constitutionality of the Washington statute. The Arizona death penalty statute in question there, unlike Washington's,[3] placed the burden of proof on the defendant and did not allow full consideration of mitigating factors.

Campbell's claim that the Washington statute provides for a mandatory sentence of death once the sentencing authority answers a special claim is also without merit. The statute contains a presumption of leniency, which the trial court properly offered as an instruction to the jury. This claim does not create a substantial showing of the violation of a federal right.

IV. FAILURE TO INSTRUCT THE JURY THAT IT COULD NOT CONSIDER CAMPBELL'S DECISION TO NOT TESTIFY DURING THE PENALTY PHASE

Campbell has not made a substantial showing that the omission of an instruction informing the jury that it could not draw any inferences from his silence during the sentencing phase of the trial violated a federal right, or that he suffered prejudice from the omission. Because he did not request such an instruction during the trial, he cannot now argue that an instruction never proposed should have been

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[3]*See State v. Bartholomew* 101 Wn.2d 631, 647, 683 P.2d 1079, 1087 (1984).

given. *State v. Mak*, 105 Wn.2d 692, 718 P. 2d 407, 441 (1983). Furthermore, the jury was instructed that there was a presumption of leniency in Campbell's favor, and that the prosecutor carried the burden of convincing the jury that there were insufficient mitigating factors to merit leniency. Implicit in this burden is the proposition that the jury must base its decision on the prosecutor's evidence, not on Campbell's silence.

V. LIMITATIONS ON CAMPBELL'S CROSS EXAMINATION OF ETHINGTON DENIED HIS RIGHT TO CONFRONTATION

Campbell has not made a substantial showing of the denial of a federal right as a result of the trial court's decision to not allow him to question Ethington about similarities between Ethington's prior crimes and the events at the Wicklund's residence, about his revocation of probation, and about his knowledge of the location of some jewelry owned by Renae Wicklund. Further, this limitation on his cross-examination, in view of he evidence against him,[4] can not be deemed prejudicial. The trial court did not abuse its discretion in finding that the questioning would be of little probative value to the jury, while its potential to confuse and mislead the jury could be great.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL ON POST TRIAL MATTERS

Campbell has not made a substantial showing of the violation of a federal right due to ineffective assistance of counsel in bringing his 1985 personal restraint petition and this motion. The court finds that the briefing that has been made available to it are well within the range of competence required by *Strickland*, in spite of the time limitations imposed upon counsel by the courts. Similarly, the court finds that Campbell was ably represented by attorneys Mestel

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[4]This evidence includes Campbell's fingerprints on a mirror from the Wicklund's house, and their jewelry found on his person.

and Savage upon direct appeal. Further, this court finds that Campbell's access to the courts has been ample.

In his *pro se* petition, he claims that his access to legal materials was hindered by the prison staff. The court finds this allegation is also without merit. He has had ample access to legal materials. *See* Affidavit of William E. Riley and Affidavit of Martin A. Manahan, Exhibits C and D to Response of the State of Washington.

VII. INEFFECTIVE ASSISTANCE OF COUNSEL DURING HIS COMPETENCY HEARING

Campbell has not made a substantial showing of the violation of a federal right as a result of his attorneys' decision to not attend his competency examination. Campbell's trial counsel requested the examination. At the examination, Campbell told the court-appointed experts that he did not want to be evaluated unless his lawyers were present. When the psychiatrist and psychologist informed Campbell that his attorneys had declined to be present, Campbell agreed to proceed. He does not claim that he was coerced into making this decision. His attorneys never protested that the examination had been conducted without them. By agreeing to proceed, he waived his statutory right to have counsel present.

Absence from such an examination is not an unusual course of conduct that is beyond the range of competent counsel. Furthermore, Campbell makes no showing of how the presence of his attorneys could have affected the outcome of the examination, particularly in view of the fact that attorneys can merely act as observers. *State v. Hutchinson*, 111 Wn.2d 872, 884 (1989). The results of the examination were never presented as evidence. Campbell's competency to stand trial was never seriously questioned by the court or his attorneys, beyond the initial request for the exam. The examination results were unequivocal. This court finds that Campbell's allegation that he did not receive effective assistance of counsel as a result of his attorneys' absence is without substance.

VIII. REMAINING ALLEGATIONS

Campbell suggests that his constitutional right to proceed pro se was violated. To preserve his right to self representation, a defendant must make a timely and unequivocal request for self representation which is not a tactic to secure delay. *United States v. Smith*, 780 F. 2d 810, 811 (9th Cir. 1986). There is no indication from the record reviewed by this court that Campbell ever asserted his right to self representation in a meaningful fashion. His attorneys from the trial testified that he was aware of this right and exercised it in part by participating in the examination of witness Judith Dirks. This court finds that this allegation is not a substantial showing that Campbell's federal right to self representation was violated.

Campbell argues that the practice of hanging prisoners sentenced for death who do not choose lethal injection is cruel and unusual punishment. This court finds that this does not raise a substantial showing of the violation of a federal right.

In regard to Campbell's remaining claims, he gives no factual support for his allegations. Further, the allegations are such that, if proven, they would constitute harmless error. Accordingly, the court find that the following claims do not create a substantial showing that Campbell's federal rights were violated: 1) Campbell's right to effective assistance of counsel, and his right to be present at all stages of his trial was violated when a pre-trial conference was held without him; 2) he was deprived of his right to be present when his attorneys waived his presence at the taking of exceptions to jury instructions; and 3) his Fifth Amendment right was violated when the prosecution commented on Campbell's failure to testify in his rebuttal closing argument.

Campbell's claim that his death sentence is cruel and unusual where no qualified hangman exists is moot. Further, this court finds that the Washington Supreme Court's disposition of Campbell's objection to his choice between hanging or lethal injection, and his contention that he must

serve out his preexisting sentences before being put to death do not violate Campbell's rights under the United States Constitution.

The Clerk of this Court is directed to furnish copies of this Order to all counsel of record.

DATED this 27th day of March, 1989.

JOHN C. COUGHENOUR
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. C89-456C

CORRECTED MINUTE ORDER

CHARLES CAMPBELL,

Petitioner,

v.

JAMES BLODGETT, et al.,

Respondents.

The following Minute Order is made by direction of the Court, the Honorable John C. Coughenour, U. S. District Judge:

This Court finds that an appeal by petitioner would present questions of law of some substance, limited to the issue of whether a stay should be granted. A certificate of probable cause should issue, limited to the issue of whether a stay should be granted. *Gardner v. Pogue*, 558 F.2d 548 (9th Cir. 1977); 28 U.S.C. § 2253. Therefore, this Court grants petitioner a certificate of probable cause to appeal from the order of March 27, 1989.

Petitioner's application to proceed in forma pauperis in his habeas corpus proceeding pursuant to 28 U.S.C. § 2254 is granted.

The Clerk of the Court is directed to send uncertified copies of this Order to the Clerk of the Court of Appeals for the Ninth Circuit, to petitioner and to all counsel of record in this case.

Filed and entered this 28th day of March, 1989.

BRUCE RIFKIN, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 89-35210

D.C. No.
CV 89-456-JCC

ORDER

CHARLES CAMPBELL,

Petitioner-Appellant,

v.

JAMES BLODGETT, Superintendent, Washington State Penitentiary, Walla Walla, Washington; and KENNETH O. EIKENBERRY, Attorney General, State of Washington,

Respondents-Appellees.

Before: HUG, POOLE and HALL, Circuit Judges

Appellant's motion for a stay of execution pending the appeal in his 28 U.S.C. § 2254 habeas action is granted.

The transcripts have already been filed in the district court. Therefore, the clerk of the district court is requested to forward the Certificate of Record to this court.

Appellant's opening brief and excerpts of record are due May 8, 1989; appellee's brief is due June 7, 1989; the reply brief, if any, is due June 21, 1989.

No extensions of time will be granted except under extraordinary circumstances.

This panel retains jurisdiction of this appeal.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 89-35210

D.C. No.
CV 89-456-JCC

ORDER

CHARLES RODMAN CAMPBELL,

Petitioner-Appellant,

v.

JAMES BLODGETT, Superintendent, Washington State Penitentiary, Walla Walla, Washington; and KENNETH O. EIKENBERRY, Attorney General, State of Washington,

Respondents-Appellees.

Filed: February 21, 1991

Before: HUG, POOLE and HALL, Circuit Judges.

The court has under submission an appeal on behalf of Charles Rodman Campbell from the order of the United States District Court for the Western District of Washington denying his petition for habeas corpus.

On January 23, 1990, petitioner filed a motion to withdraw from submission three of the issues tendered by him therein, the withdrawal to be "without prejudice" to petitioner's right to pursue his requests to this court for habeas corpus relief. Although represented by counsel, petitioner has moved to dismiss counsel representing him before this court and to allow him to proceed pro se, but also to have new counsel appointed. That motion also is under submission.

We have been advised that petitioner filed a personal restraint petition in the Supreme Court of Washington at No. 57406-5 of the records of that court; that his request to that court for appointment of counsel was granted on August 2, 1990; and that Michael P. Iaria, Esquire, was ap-

pointed to be counsel for petitioner in that petition. We are further informed that on August 2, 1990, the Supreme Court of Washington established a briefing schedule concerning the issues tendered by the personal restraint petition and set a hearing date thereon for February 5, 1991.

This court has not been advised by counsel for the State of Washington, by counsel appointed to represent petitioner on his personal restraint petition, or by Messrs. Al Lyon and Robert Gombiner, who are counsel of record on behalf of petitioner-appellant on the appeal pending before us, as to the current status of the proceedings in the Washington Supreme Court. The court understands, however, that the personal restraint issues were argued on or about February 5, 1991 and were taken under submission.

This court is most intent that all issues raised by the petitioner be ruled upon by the Washington Supreme Court prior to any ruling by this court. It is essential that we avoid piecemeal litigation of these issues. The fact that the Washington Supreme Court has appointed new counsel and held an additional en banc hearing on three issues causes concern that the application for a writ of habeas corpus in the Federal District Court contained issues not exhausted in the Washington State courts and, thus, may require dismissal pursuant to *Rose v. Lundy,* 455 U.S. 129 (1987).

Counsel of record for the appellant and for appellees in the case before us are hereby requested to advise this court within 10 days of the current status of the proceedings pending in the Washington Supreme Court, and of any orders made therein or of any other developments which might probably affect the continued vitality of the appeal still pending before us. Additional briefing by counsel may be required depending upon the responses received. Submission of this case is withdrawn pending the responses of counsel and the subsequent determination of whether further briefing is required.

COUNSEL

1. Al Lyon, Mestel & Muenster, Everett, Washington; Robert Gombiner, Nance, Iaria & Gombiner, Seattle, Washington, for the Petitioner-Appellant.
2. Charles R. Campbell, Monroe, Washington, Pro per, for the Petitioner-Appellant.
3. Paul D. Weisser, Assistant Attorney General, Olympia, Washington; John M. Jones, Assistant Attorney General, Corrections Division, Olympia, Washington, for the Respondents-Appellees.

APPENDIX E

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 89-35210

D.C. No.
CV 89-456-JCC

ORDER

CHARLES RODMAN CAMPBELL,

Petitioner-Appellant,

v.

JAMES BLODGETT,

Respondent-Appellee.

Filed: August 7, 1991

Before: HUG, POOLE and HALL, Circuit Judges.

The motion of petitioner filed herein on June 10, 1991 unequivocally asserts his desire to discharge appointed counsel and to represent himself in all further proceedings in this appeal. He is entitled to do so under *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). This motion is therefore GRANTED. Attorneys Gombiner and Lyon are relieved from further representation of petitioner.

Petitioner's earlier motions to withdraw issues III, IV, and V presented in the original briefs in this appeal are DENIED. Petitioner, in his June 10, 1991 motion, notes that in light of the Washington Supreme Court opinion, *In the Matter of the Personal Restraint Petition of Charles Rodman Campbell*, No. 57406-5, entered March 21, 1991, rehearing denied May 15, 1991, the request to withdraw the issues is no longer desired.

Petitioner on June 10, 1991 filed a document notifying this court that he intended to file a *pro se* petition for habeas corpus in Federal District Court in Washington based upon

the issues presented to and rejected by the Washington Supreme Court in the above-referenced Case No. 57406-5.

In petitioner's *pro se* response to our order of February 21, 1991, he represents that the issues presented to the Washington Supreme Court in Case No. 57406-5 are the last remaining issues in his case and that he plans no further personal restraint petitions before that court. Thus, the issues ruled upon by the Washington Supreme Court, together with those issues now before us on appeal, represents the entirety of issues to be resolved in this case.

One complete appeal of some of the issues in this case has already been processed through the federal district court, the Ninth Circuit Court of Appeals, consideration and rejection of rehearing en banc by the Ninth Circuit Court of Appeals, and petition and rejection for certiorari by the United States Supreme Court. *See Campbell v. Kincheloe*, 829 F.2d 1453 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988). This was completed only to encounter a new petition for habeas corpus because some issues had not been given full consideration by the Washington Supreme Court and presented in the petition to the federal district court. In order to avoid a possible repetition of this piecemeal review, we consider it desirable, before the resolution of this appeal, that the remaining issues that were presented to the Washington Supreme Court, which petitioner states he intends to present in a habeas corpus petition to the federal district court, be considered and ruled upon by that court.

In the notice filed by petitioner on June 7, 1991, he informed this court that he will be filing a *pro se* petition for habeas corpus in the federal district court. To date, we have received no notification that such a petition has been filed. The petitioner will have until and including August 30, 1991 to file such a petition. A ruling on that petition could possibly obviate the need for further consideration of this appeal, or in the event there is an appeal from the district court's ruling, that appeal will be consolidated with this appeal.

COUNSEL LISTING

Charles Rodman Campbell, Pro per, Walla Walla, Washington, petitioner-appellant.

Paul D. Weisser, Assistant Attorney General, and John M. Jones, Assistant Attorney General, Corrections Division, Olympia, Washington, for respondents-appellees.

APPENDIX F

THE SUPREME COURT OF WASHINGTON

No. 57406-5

ORDER

In the Matter of the Personal
Restraint Petition of

CHARLES RODMAN CAMPBELL,

Petitioner,

At its February 5, 1991 en banc administrative conference, this court considered Charles Rodman Campbell's personal restraint proceeding challenging the death sentence he received for the 1982 aggravated first degree murders of Shannah and Ranae Wicklund and Barbara Hendrickson. *See State v. Campbell*, 103 Wn.2d 1, 4-5, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094 (1985) (affirming convictions and sentence on direct appeal); *Campbell v. Kincheloe*, 829 F.2d 1453 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988) (affirming denial of first federal habeas corpus action), *later proceeding*, *State v. Campbell*, 112 Wn.2d 186, 770 P.2d 620 (1989) (affirming death warrant).

As a threshold matter, the State contends that various procedural bars preclude Mr. Campbell from raising the issues he now asks this court to consider. *See In re Taylor*, 105 Wn.2d 683, 688, 717 P.2d 755 (1986); *In re Haverty*, 101 Wn.2d 498, 503, 681 P.2d 835 (1984); *In re Jeffries*, 114 Wn.2d 485, 492, 789 P.2d 731 (1990); RAP 16.4(d); RCW 10.73.140. While the State's position may be well-taken, the court nonetheless has reviewed, and hereby rejects, each of Mr. Campbell's claims on its merits.[1]

(1) Mr. Campbell contends that the trial court's penalty phase instructions erroneously permitted the jury to consid-

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[1]While the issues are addressed here in the order they are presented in counsel's brief, the court has also considered all of the pro se pleadings Mr. Campbell submitted before February 5.

er sympathy, both for the defendant, contrary to *In re Rupe*, 115 Wn.2d 379, 396, 798 P.2d 780 (1990), and for the victims, contrary to *Booth v. Maryland*, 482 U.S. 496, 504, 96 L.Ed.2d 440, 107 S. Ct. 2529 (1987) and *South Carolina v. Gathers*, 490 U.S. 805, 104 L.Ed.2d 876, 881-82, 109 S. Ct. 2207 (1989); *see also Saffle v. Parks*, ___ U.S. ___, 108 L.Ed.2d 415, 110 S. Ct. 1257 (1990) (upholding "no sympathy" instruction). The penalty phase instructions do not mention "sympathy" at all; they neither preclude consideration of that factor nor direct the jury to consider it. There is no "reasonable likelihood" that the jury interpreted the instructions in the manner Mr. Campbell claims. *Boyde v. California*, ___ U.S. ___, 108 L.Ed.2d 316, 329, 110 S. Ct. 1190 (1990). Nor are the portions of the prosecutor's argument to which Mr. Campbell objects an improper appeal to sympathy for the victims. The factors the prosecutor mentioned were circumstances about which Mr. Campbell was aware when he committed the murders and for which he is therefore responsible. *See Booth v. Maryland, supra* at 504-05 n.7.

(2) Mr. Campbell contends the trial court improperly allowed the jury to consider nonstatutory aggravating factors by instructing it to "have in mind the crime" and to consider, in assessing the possible existence of mitigating circumstances, "any relevant evidence, including but not limited to" the factors listed in RCW 10.95.070. The same instructions were given, and upheld, in *State v. Mak*, 105 Wn.2d 692, 751, 718 P.2d 407 (1986); *State v. Jeffries*, 105 Wn.2d 398, 421, 717 P.2d 722 (1986); and *State v. Rupe*, 108 Wn.2d 734, 763, 743 P.2d 210 (1987); *see also State v. Campbell*, 103 Wn.2d 1, 28, 691 P.2d 929 (1984) (nothing in these instructions imposed additional aggravating factors). The "facts and circumstances of the crime" which the jury may consider in reaching its verdict are limited not to those which made the crime aggravated first degree murder. *State v. Rupe, supra* at 755; *see also State v. Mak, supra* at 723.

(3) Mr. Campbell contends that death sentences imposed under RCW 10.95 cannot be meaningfully reviewed for proportionality, and that his sentence is therefore invalid. This court conducted the required statutory review as part of Mr. Campbell's direct appeal. The court compared the case to others in which the defendant had been charged with aggravated first degree murder. The court found no other case presenting four aggravating factors or any killings "more premeditated and revengeful" than those Mr. Campbell committed. *State v. Campbell*, 103 Wn.2d 1, 29-30, 691 P.2d 929 (1984). Mr. Campbell has not shown that the statutory review he received was meaningless, *see Lewis v. Jeffers*, ___ U.S. ___, 111 L.Ed.2d 606, 110 S. Ct. 3092 (1990), or that his sentence is disproportionate to those imposed in similar cases which existed when we reviewed his sentence on direct appeal.

In a pleading filed by counsel on February 19, 1991, [2] Mr. Campbell asks us to stay this proceeding and to order the trial courts in a number of aggravated first degree murder cases to provide the reports required in such cases under RCW 10.95.120. Mr. Campbell evidently believes a review of those reports-the vast majority of which involve cases tried after his appeal was final-would support his claim that his sentence is disproportionate. This belief is incorrect as to cases tried after his appeal was final. *In re Jeffries, supra* at 491 (this court will not engage in a never-ending sentence review based on new murder cases). In any event, the motion is untimely. We have completed our consideration of Mr. Campbell's personal restraint petition and

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[2]Counsel gave this pleading three captions: *In re Campbell*, cause No. 57406-5; *State v. Furman*, cause No. 57003-5, and *Furman and Campbell v. Superior Court*, without a cause number. The pleading is entitled "Motion of Petitioners Campbell and Furman for Writs of Mandamus and Related Relief."

will not stay our decision to enable him to present an additional argument.[3]

(4) Mr. Campbell contends that the mitigation question put to the jury in the penalty phase, in the language specified by RCW 10.95.060(4), erroneously implied that the jurors had to find at least two mitigating circumstances in order to vote against the death penalty. *See In re Jeffries, supra* at 494-95. The instruction cannot properly be considered in isolation, out of the context of the overall charge. *Boyde v. California*, 108 L.Ed.2d at 327. The jury was told it could consider as mitigating, any "fact about the offense, or about the defendant, which in fairness or mercy, may be considered in extenuating or reducing the degree of moral culpability and punishment, though it does not excuse the offense." The jury was also told that, in answering the question posed, it could "consider any relevant factors, including but not limited to" eight listed factors. These instructions, taken as a whole, could not have been interpreted as precluding the jury from sparing Mr. Campbell's life unless it found at least two mitigating circumstances.

(5) Mr. Campbell contends that during closing argument in the penalty phase the prosecutor improperly commented on Mr. Campbell's demeanor. The prosecutor went through each of the "relevant factors" listed in RCW 10.95.070 (and in the jury instructions) and argued that none was mitigating in this case. In connection with the sixth factor-the defendant's ability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law-the prosecutor noted, "Now, you've all had an opportunity to observe Mr. Campbell in this long proceeding. There's nothing from his conduct here . . . that indicates he's suffering from any sort of mental disease or defect." Mr. Campbell contends that a defendant's off-the-

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[3]We offer no opinion whether the matters raised in the February 19 pleading might be raised by Mr. Campbell in a new personal restraint proceeding, or are properly before the purported action against the "Superior Court" has not been commenced.

stand behavior or his appearance during trial are improper subjects of comment. Mr. Campbell has shown no prejudice from this alleged misconduct, however. The only purpose for which the prosecutor suggested that the jury consider Mr. Campbell's demeanor was to assess his mental state at the time of the crime. Mr. Campbell never disputed his capacity to understand the wrongfulness of his conduct, nor did he claim any inability to conform his conduct to the requirements of the law.

(6) Mr. Campbell contends that the prosecutor commented on his failure to testify. This is simply inaccurate. The comment Mr. Campbell cites, "he doesn't point out any mitigating circumstances, because there are none," was a comment on defense counsel's closing argument, not Mr. Campbell's failure to testify. Under Washington's death penalty scheme, the State is generally precluded from presenting evidence regarding a mitigating factor until the defense raises that particular factor. *State v. Bartholomew*, 98 Wn.2d 173, 654 P.2d 1170 (1982), *vacated and remanded*, 463 U.S. 1203 (1983), *adhered to on remand, State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984). It is consistent with this statutory scheme for a prosecutor to observe that a defendant has specifically argued no mitigating factor.

(7) Mr. Campbell contends that RCW 10.95 fails to provide the sentencer with appropriate and reliable standards by which to determine whether the death penalty should be imposed, and that instructions which quote the statute improperly limit factors the jury can consider in mitigation of punishment. Both of these claims were rejected on direct appeal, the court holding that the death penalty statute (as embodied in the jury instructions) adequately channels jury discretion and gives the defendant a full opportunity to present mitigating evidence. *State v. Campbell*, 103 Wn.2d at 27-29. Mr. Campbell raised the same issues in his second federal habeas corpus action, which is now on appeal. He now asks this court to refrain from deciding these issues until the federal court renders its decision. There is no reason

to defer, nor does Mr. Campbell offer any "good cause" for renewing these claims in this court. The law has not changed. *See, e.g., State v. Jeffries*, 105 Wn.2d 398, 717 P.2d 722 (1986); *State v. Mak*, 105 Wn.2d 692, 718 P.2d 407 (1986); *State v. Harris*, 106 Wn.2d 784, 725 P.2d 975 (1986).

(8) Mr. Campbell contends that the prosecutor committed reversible error in the penalty phase closing argument by commenting on Mr. Campbell's future dangerousness. He complains that this argument raised the issue of future dangerousness for the first time and thereby denied him fundamental fairness. Brief of Petitioner, at 58. The statute itself makes "future dangerousness" an issue in all capital cases by including the likelihood of additional criminal conduct as one of the "relevant factors" the jury may consider in the penalty phase. The jury may be instructed on all of the statutory factors even if no evidence is presented on all of them. *State v. Rupe*, 101 Wn.2d 664, 709, 683 P.2d 571 (1984). The prosecutor may properly comment on all parts of the instruction.

In sum, the court finds no basis to grant relief. Mr. Campbell has not shown that his death sentence was imposed under an unconstitutional statute or that his trial was tainted by instructional or evidentiary errors or by prosecutorial misconduct. Nor is there any reason to stay the disposition of this case, or any part of it, pending either the Ninth Circuit's decision in the habeas action or receipt of additional RCW 10.95.120 reports. Accordingly,

IT IS HEREBY ORDERED:

The personal restraint petition is dismissed.

CHIEF JUSTICE

March 21, 1991

In re Campbell
Dissent to Order

No. 57406-5

UTTER, J.--I dissent for three reasons. First, the trial court's instructions improperly allowed the jury to consider nonstatutory aggravating factors. Second, this court's failure to perform meaningful proportionality review denies Campbell due process. Third, the prosecutor improperly commented on Campbell's in-court demeanor.

Campbell argues that the trial court improperly allowed the jury to consider nonstatutory aggravating factors by instructing it to consider "any relevant" factors in assessing the possible existence of mitigating circumstances. I agree. When the State authorizes capital punishment, this court has a

> constitutional responsibility to tailor and apply [the] law in a manner that avoids the arbitrary and capricious infliction of the death penalty. * * * [The State] must channel the sentencer's discretion by "clear and objective standards" that provide "specific and detailed guidance," and that "make rationally reviewable the process for imposing a sentence of death."

(Footnotes omitted.) *Godfrey v. Georgia*, 446 U.S. 420, 428, 64 L.Ed.2d 398, 100 S. Ct. 1759 (1980). We interpret that language as requiring this court to

> maintain[] a clear and narrow interpretation of the aggravating circumstances to provide the sentencing authority with the constitutionally necessary guidance.

State v. Bartholomew, 98 Wn.2d 173, 189, 654 P.2d 1170 (1982), *vacated and remanded*, 463 U.S. 1203 (1983), *adhered to on remand*, 101 Wn.2d 631, 683 P.2d 1079 (1984). Therefore, in order to maintain the jury's channeled discretion and preserve meaningful appellate review, "the jury's liberal mandate . . . to consider 'any relevant factors' shall be limited to mitigating factors only." *Bartholomew*, 98 Wn.2d at 198. The challenged instruction in this case should have instructed the jury to consider only relevant

mitigating factors. The broader instruction approved by the majority creates the possibility that juries will consider nonstatutory aggravating factors. That possibility undermines our ability to assure that the jury relied only on the statutory aggravating factors in imposing the death penalty.

I also dissent because, once again, this court has failed to perform a meaningful proportionality review. Proportionality review is an important safeguard against arbitrarily imposed death sentences. *Pulley v. Harris*, 465 U.S. 37, 50, 79 L.Ed.2d 29, 104 S. Ct. 871 (1984). More importantly, our state statutes mandate proportionality review. *See* RCW 10.95.130(2)(b).[1]

On direct review this court stated that it found no other cases involving four aggravating factors or any killings "more premeditated and revengeful than those committed by defendant." *State v. Campbell*, 103 Wn.2d 1, 30, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094 (1985). The majority was convinced that any case involving "such a multitude of aggravating factors" would result in the imposition of the death penalty. 103 Wn.2d at 30. Yet a review of superior court questionnaires now on file pursuant to RCW 10.95.120 reveals six cases in which the death penalty was either not sought or not imposed despite a finding of four aggravating factors. *See State v. Cummings*, Walla Walla County cause 85-1-00044-4 (no death penalty sought); *State v. Dykgraaf*, Clark County cause 86-1-00111-5 (jury refused to impose death penalty); *State v. McNeil*, Yakima County cause 88-1-00428-1 (two badly mutilated victims, no death penalty sought); *State v. Rice* (Herbert), Yakima County cause 88-1-00427-2 (two elderly victims tortured and murdered, jury refused to impose death penalty); *State v. Stohs*, Kitsap County cause 89-1-00025-1 (no death penalty

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[1]I will not reiterate all of the problems related to proportionality review. For a more in depth discussion to this topic, I refer the court to my concurrence and dissent in *State v. Jeffries*, 105 Wn.2d 398, 431, 717 P.2d 722 (1986).

sought); and *State v. Yates,* Kitsap County cause 87-1-00444-7 (jury refused to impose death penalty).

In citing these cases I do not decide whether each case is in fact "similar" within the meaning of the sta[t]tute. Instead, I cite these cases for two reasons. The first reason is to refute the original *Campbell* majority's assumption that a finding of four aggravating factors necessarily leads to an imposition of the death penalty. The second is to show the inadequacy of the proportionality review done in this case.

I also dissent from the majority's conclusion that the prosecutor's remarks concerning Campbell's courtroom demeanor were proper. A defendant's behavior off the witness stand is not evidence, and is therefore not properly the subject of prosecutorial comment. To allow the prosecutor to call the jury's attention to behavior that is not evidence introduces character evidence for purpose of proving guilt, violates the defendant's right to be convicted only on evidence properly admitted at trial, and amounts to an indirect comment on defendant's failure to testify. *United States v. Pearson*, 746 F.2d 787, 796 (11th Cir. 1984). *Accord United States v. Schuler*, 813 F.2d 978 (9th Cir. 1987); *United States v. Carroll*, 678 F.2d 1208 (4th Cir. 1982); *United States v. Wright*, 489 F.2d 1181 (D.C. Cir. 1973).

Finally, for all the reasons stated in my previous opinions, I agree with Campbell that RCW 10.95 does not provide the sentencer with appropriate and reliable standards by which to determine whether the death penalty should be imposed. *See State v. Campbell, supra.*

/S/

(2)

No. 91-716

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

In re JAMES BLODGETT, Superintendent of Washington State Penitentiary, Walla Walla, Washington, and KENNETH O. EIKENBERRY, Attorney General of the State of Washington,
Petitioners.

RESPONSE TO PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND TO THE HONORABLE PROCTER HUG, JR., CECIL F. POOLE, AND CYNTHIA HOLCOMB HALL, CIRCUIT JUDGES

Circuit Judges PROCTER HUG,
CECIL F. POOLE and
CYNTHIA HOLCOMB HALL

United States Court of Appeals
for the Ninth Circuit
121 Spear Street
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San Francisco, CA 94119-3939
(415) 744-9810

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No. 91-716

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

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I

SUMMARY OF ARGUMENT

This petition requests a writ of mandamus compelling the Ninth Circuit Court of Appeals to decide the pending appeal of *Campbell v. Blodgett,* No. 89-35210, which seeks review of denial by the district court of a petition for writ of habeas corpus. However, the Ninth Circuit Court of Appeals properly concluded that the most efficient and expeditious method to consider this case was to withdraw it from submission pending any appeal from the district court's disposition of a further habeas corpus petition brought by the same appellant that is presently pending before that court. This Court should therefore deny this petition for a writ of mandamus.

II

ARGUMENT

It is the intent of this panel of the Court of Appeals for the Ninth Circuit to avoid the repetition of piecemeal appeals of the conviction and death sentence of Charles Rodman Campbell. It was this intent that led this panel to enter in the *Campbell v. Blodgett* appeal, No. 89-35210, its order of February 21, 1991 and its order of August 7, 1991. In the first petition for habeas corpus before the United States District Court, Campbell raised issues that had not been ruled upon by the Washington Supreme Court, which he was required to delete in order to avoid dismissal of the petition. The petition on the remaining exhausted issues was considered and denied by the United States District Court; the denial was affirmed by a panel of the Court of Appeals for the Ninth Circuit; the petition for rehearing and suggestion for en banc consideration was denied; then a petition for certiorari was denied by the United States Supreme Court. Four years had passed since the entry of the order by the Washington Supreme Court denying Campbell's personal restraint petition.

Campbell's second state personal restraint petition raised the unexhausted issues that had not been considered by the Washington Supreme Court. We must observe that the zeal of the Washington Attorney General's Office in pressing for a quick resolution of Campbell's first petition without allowing a few weeks to assure that all of the issues were considered, in the first instance, by the Washington Supreme Court, is why we are now faced with subsequent petitions after four years of legal procedures dealing with the first petition. Our panel is now confronted with a similiar situation. The Attorney General presses us to proceed with the appeal of the denial of the second federal petition knowing that a third federal petition is pending.

The second state personal restraint petition was denied by the Washington Supreme Court. Thereafter, a second petition for habeas corpus before the United States District Court was denied.

The appeal of that order is presently before our panel. However, a third personal restraint petition was filed and considered by the Washington Supreme Court while the appeal of the second federal petition for habeas corpus was pending before our panel. This state petition raised issues that the Washington Supreme Court treated as substantial and not frivolous. Counsel was appointed, a briefing schedule set, and oral argument held. If the state petition were to have been granted, the appeal before our panel would have been moot. If the petition were to have been denied, a petition for habeas corpus to the United States District Court was virtually assured. Thus, submission of the appeal of the denial of the second federal petition was withdrawn at that time by our panel.

The Washington Supreme Court has since denied the third state petition, with a dissenting opinion. Thereafter, Campbell, in his pro se response to our order requiring a status report, stated his intention to file a third petition for a writ of habeas corpus in the United States District Court, raising the issues that had just been ruled upon by the Washington Supreme Court. He represented he intended to make this his final petition.

This panel did not invite Campbell to file an additional petition for habeas corpus, as incorrectly represented by the Washington Attorney General's Office, but set a time limit for him to file the petition that he has indicated he intended to file pro se. *See* Petitioners' Appendix E; *Campbell v. Blodgett,* 940 F.2d 549, 550 (9th Cir. 1991). The time was extended for good cause. The petition has been filed in the United States District Court and a briefing schedule has been set.

Whether the third federal petition is granted or denied, it is virtually certain that there will be an appeal to this court, either by Campbell or by the State. It is the opinion of this panel that the most efficient and expeditious method of considering this case is to consolidate all of the issues remaining to be decided concerning the conviction and death sentence of Charles Rodman Campbell in this one appellate proceeding. No purpose is to be served by deciding the appeal of the second petition for habeas corpus, only to leave the order granting or denying the third petition to trail in a subsequent appeal.

In our dual sovereignty system of government, delays occasioned in processing of the appeals of convictions involving the death penalty are inevitable, but improvement can be made. The Ninth Circuit formed a Death Penalty Task Force, with representatives of the state prosecutors, defense attorneys, and the courts to develop improved procedures in the federal courts to avoid unnecessary delays. One of the major objectives identified by the Task Force is to strive to eliminate successive habeas corpus petitions by assuring that all issues are developed and considered in the initial habeas corpus proceedings. Although this case has proceeded well beyond that point, it is at least possible to assure that the appeals of the remaining two petitions are consolidated. It is with this in mind that our panel entered the orders withdrawing submission pending the District Court's decision on the third petition for habeas corpus and any appeal thereof.

Although the Attorney General suggests that this panel should have dismissed the second petition on the basis of the recent decision of *McCleskey v. Zant*, ___ U.S. ___, 111 S. Ct. 1454 (1991), no motion or brief to that effect has been filed by the Attorney General raising this contention. We, of course, are fully aware of the *McCleskey* decision, and recognize that its applicability to Campbell's second or third petition may well become an issue for our consideration. If properly raised and briefed, the applicability of *McCleskey* and its recent interpretation by a panel of our court in *Harris v. Vasquez*, 943 F.2d 930, 945-46 (9th Cir. 1991), will be fully considered.

Other cases in the future, with other procedural histories and different procedural backgrounds, may well call for other appellate procedural decisions. However, with the current posture of this case, we deem the procedure adopted to be the most expeditious.

III

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of mandamus.

Dated this 18th day of November 1991.

Circuit Judges PROCTER HUG,
CECIL F. POOLE and
CYNTHIA HOLCOMB HALL

United States Court of Appeals
for the Ninth Circuit
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(3)

NO. 91-716

IN THE
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1991

In re JAMES BLODGETT, et. al.,

Petitioners,

ON PETITION FOR WRIT OF MANDAMUS
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF PETITIONER

SETH R. DAWSON
Prosecuting Attorney
for Snohomish County

SETH AARON FINE
Deputy Prosecuting
Attorney
Counsel of Record

Snohomish County
Prosecutor's Office
3000 Rockefeller
Everett, WA 98201
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INTEREST OF AMICUS CURIAE

This brief is filed on behalf of the State of Washington, as represented by the Snohomish County Prosecutor's Office. Under Washington law, the Prosecuting Attorney represents the State in all criminal actions arising within the county. Wash. Rev. Code § 36.27.020(4). This office prosecuted Campbell at trial and represented the State on direct appeal and during all state post-conviction proceedings.

SUMMARY OF THE ARGUMENT

The harm resulting from extended collateral review is vividly demonstrated in this case. There has been severe harm to both the victims' families and to society in general. The families still live in fear that Campbell might somehow

gain an opportunity to take further revenge. They do not feel that they can begin healing until justice has been done and Campbell's sentence is carried out.

The harm to society is even more egregious. This case has become a notorious example of the State's inability to protect rape victims. Because of this perceived inability, rape victims are not reporting the crimes to police, and the rapists are remaining free to commit further crimes. Women who are being raped in Washington are paying the price for the Ninth Circuit's inaction.

ARGUMENT

This court has repeatedly recognized the adverse effects of successive post-conviction proceedings:

> If collateral review of a conviction extends the ordeal of trial for both society and the accused, the ordeal worsens during subsequent collateral proceedings. Perpetual disrespect for the finality of convictions disparages the entire criminal justice system.

McCleskey v. Zant, ____ U.S. ____, 113 L.Ed.2d 517, 543, 111 S.Ct. 1454, 1469 (1991) (citation omitted). These effects are particularly severe in capital cases: "[U]nlike a term of years, a death sentence cannot begin to be carried out by the State while substantial legal issues remain outstanding." Barefoot v. Estelle, 463 U.S. 880, 888, 77 L.Ed.2d 1090, 103 S.Ct. 3383 (1983).

In Campbell's case, this "ordeal" is being suffered in two ways. First, there is the impact on the victims' families. They remain in fear that Campbell might somehow escape and take even further

revenge. This fear is not irrational: Campbell has already once revenged himself on Renae Wicklund and Barbara Hendrickson six years after they testified against him, during a time when he was supposedly in prison.

The families wish to close this horrible chapter in their lives. They feel that they can begin healing only when justice has been carried out. The delay in Campbell's case keep the wound open. As Renae's mother has put it:

> For a long time, I blamed the delays in this case on Campbell and thought that he was still victimizing us. Now, I believe that it is no longer Campbell who is doing this to us--It is the criminal justice system that is allowing him to do it.

Appendix at 11.

Even worse than the impact on the victim's families is the impact on rape

victims in general. The crimes committed by Campbell were three of the most notorious murders that have ever occurred in Washington. Six years before, Campbell had raped and sodomized Renae Wicklund. In the course of the rape, he had held a knife against the throat of her one-year-old daughter Shannah. Despite this, Renae and Barbara had the courage to testify against him. To repay them for their courage, Campbell murdered all three of them.

The immediate consequence of this crime was fear. Rape victims are afraid that if they report the crime, they too will suffer the same fate. Rapists are using references to this case as a threat to prevent police from learning about their crimes. Appendix at 20-21. As the

delays continue, new court proceedings periodically renew public attention to the case. Every time this happens, the fear is renewed as well.

The State of Washington has declared that crimes like this should be punished by death. Yet, nine years after the crimes, Campbell is still alive. This leads the public to believe that the State is unable or even unwilling to protect rape victims. Once public confidence in the law's power is destroyed, there is nothing to counteract the fear of reporting that this crime has engendered.

The harm that has resulted from the delays in this case is vividly demonstrated by the words of one rape victim. When this woman was raped, the rapist

told her that, if she told police, he would kill her like Campbell. She has never reported the crime to police. She has said that every time she hears Campbell's name mentioned in the media, "I feel I took the correct action. It reinforces that society and the courts has not yet fixed upon or clarified its values." Appendix at 22.

The consequences of the delays in this case are concrete. Because of them, rape victims are not reporting crimes committed against them. The criminals are being left free to do the same thing again. Women who are being raped in Washington are paying the price for the Ninth Circuit's inaction.

A case as notorious as this one becomes a symbol, one way or another. It

should have been a symbol of the severe punishment that will be imposed on anyone who dares commit such a heinous crime in the State of Washington. Instead, it has become a symbol of the State's inability to enforce its laws and to protect victims of violent crimes. This situation should never have been allowed to arise. It should not be allowed to endure.

CONCLUSION

This case should be brought to an end one way or another. If, contrary to the ruling of every court so far, the proceedings against Campbell were tainted by constitutional error, that error should have been promptly corrected. If, on the other hand, the proceedings were proper, the State should be allowed to carry out its lawful sentence. The petition for mandamus should be granted.

Respectfully submitted this _____ day of November, 1991.

SETH AARON FINE
Deputy Prosecuting Attorney
Snohomish County Prosecutor's Office

Attorney for Amicus Curiae

IN THE SUPREME COURT
OF THE UNITED STATES

In re JAMES BLODGETT, et al.,	)	No.
	)	AFFIDAVIT OF HILDA AHLERS
Petitioners.	)	

Hilda Ahlers, having first been duly sworn, states the following:

1. I am the mother of Renae Wicklund and the grandmother of Shannah Wicklund, two of the people who were murdered by Charles Campbell.

2. In 1989, when a clemency hearing for Campbell was scheduled, I wrote a letter to the Washington Clemency and Pardons Board, telling my feelings about the delay in this case. Rather than repeating what I said then, I am making that letter part of this affidavit.

3. Although I never saw the murder scene, I can still see it and hear the screams in my mind. Life will never be the same again. We cannot bring our loved ones back, but our good memories will keep them alive for me. I can have these good memories only if I am healing. Healing will come only after the execution.

4. For a long time, I blamed the delays in this case on Campbell and thought that he was still victimizing us. Now, I believe that it is no longer Campbell who is doing this to us--it is the criminal justice system that is allowing him to do it.

5. I thank God for giving me the strength to stand under this terrible shock and continued stress. I pray that

soon justice will be accomplished, so that I may start healing and go on with my life and fight for victim's rights so that I may help others to survive such tragedies.

/s/ Hilda Ahlers
HILDA AHLERS

Subscribed and sworn to before me this 13th day of November, 1991.

/s/ Joan Weatherly
NOTARY PUBLIC for the State of North Dakota, residing at Jamestown, N.D.
My commission expires:
JOAN WEATHERLY
Notary Public, STUTSMAN CO., N. DAK.
My Commission Expires July 3, 1992
(seal)

February 16, 1989

Dear Members of the Board

Ref: Case # _____
Charles Rodman Campbell

I am writing this letter to try to share some of my thoughts and feelings at

this time--7 years after the murders of my beloved daughter and grandaughter, Renae and Shannah Wicklund, and their neighbor and good friend, Barbara Hendrickson.

I believe in the death penalty and that it is fair and just for Charles Campbell to be executed for ending these precious lives. I hope and pray that this execution will take place very soon--on the date that has been set at this time of March 30, 1989.

I feel that I will be better able to begin dealing with these losses and get started on the long road toward recovery (as much as possible) once this execution is carried out. Then I will be better able to at last sort through Renae and Shannah's things, including their

belongings that have been kept as evidence all this time.

I hope and pray that there will not be any delays in the carrying out of his execution. Delays add more stress--the burden continues to accumulate--the earlier pain does not fade away.

People--well meaning--are always asking what's going on with the case. Often I avoid going downtown so that I don't have to deal with the additional pain of these questions and comments. I look forward to the day I can say--"He was executed, he has paid the earthly penalty that our laws and society and justice demand, and now most important of all I know that he can never hurt and/or take anyone elses life." I won't have to constantly worry that he may find a way

to escape someday and hurt others. I also won't have to worry that someone, in a position to do so, may take pity and decide to be merciful to this person who showed absolutely no pity or mercy for Renae, Shannah and Barbara. This you will know if you've reviewed this case thoroughly and looked at the photos taken at the scene of the crime.

Genesis 4:9 & 10 in the Bible tells us that, after Cain had murdered Able, God said that the voice of Ables blood was crying out to him from the earth. Please hear the silent cries of pain caused by the indescribable horrors that my Renae and Shannah were put through and their lives taken and all the memories that we would have created but have been denied us by the acts of Charles Campbell.

I close by asking that Justice be served for Renae, Shannah and Barbara, for mercy and some peace for myself and other family members and friends. This will be accomplished through the execution of Charles R. Campbell just as soon as possible

Respectfully,

/s/ Hilda Ahlers

11/13/91

To Whom It May Concern:

My name is Lorene Ahlers Iverson, and I am the sister of Renae Ahlers Wicklund and aunt of Shannah Wicklund. It will be 10 years in April of 1992 that my sister and niece were murdered by Charles Rodman Campbell.

I live in fear that one day Charles Rodman Campbell will either escape prision or the judicial system and take revenge on myself or my family. I know in detail what this man is capable of doing to a human life.

The longer the system delays Charles Rodman Campbell's execution, the more intense my fear becomes of him being released or escaping into society.

I don't want Charles Rodman Campbell

exectued for revenge. I need to positively know that he will never physically harm any human being again. Every day that he is allowed to live is another day that I live in fear of my life and that of my family.

/s/ Lorene Ahlers Iverson
LORENE AHLERS IVERSON

Subscribed and sworn to before me this 14th day of November, 1991.
/s/ David L. Odin
Notary Public

David L. Odin
Notary Public, STATE OF NORTH DAKOTA
My Commission Expires JUNE 13, 1996
(seal)

IN THE SUPREME COURT
OF THE UNITED STATES

In re JAMES BLODGETT, et al., Petitioners.	No. AFFIDAVIT OF CANDY ASHBROOK

Candy Ashbrook, having first been duly sworn, states the following:

1. I am the Director of Providence Hospital Sexual Assault Center in Everett, Washington. I have held this position since April, 1990. Before becoming director, I worked for the Center in various other positions since January, 1980.

2. The Sexual Assault Center provides advocacy services for victims of sexual assault and their non-offending family members. It serves between 2500

and 3000 victims and family members per year.

3. Among other services, the Center maintains a Crisis Line. This is a 24-hour-a-day phone center, which provides emergency assistance for victims of sexual abuse.

4. In 1982, the year that Campbell committed his crimes, there was a 31% decrease in calls received by the Center's crisis line. Many victims who did call said that they would not report the crime to law enforcement because of what had happened to Campbell's victims.

5. Since 1982, victims have continued to refer to the Campbell case as a reason for not reporting crimes. Many rapists have told their victims that they would kill them if they reported,

specifically using the Campbell case to add credibility to this threat.

6. Whenever there is media attention to the Campbell case, it creates additional trauma to rape victims. There is an increase in calls to the Crisis Line by victims who wish to discuss concerns stemming from that case.

7. The Sexual Assault Center also conducts an educational program. Speakers are sent to schools to educate the students on preventing sexual abuse. The program reaches 1000 to 1500 high school students each year. I have personally participated as a speaker in these programs.

8. One of the concerns frequently mentioned by these students involves the Campbell case. They often ask how a

person can be sure that nothing will happen to them if they report the crime to police, citing that case as an example.

9. The experiences of a woman who was raped in 1989 provide a concrete example of these problems. I have personally counseled this woman who was raped in 1989. She has told me that the rapist held a knife to her throat during the rape. He said that if she told police he would kill her like Campbell. Because of this threat, the woman has never reported the crime to police. She has said that whenever she hears Campbell's name mentioned in the media, "I feel I took the correct action. It reinforces that society and the courts has not yet fixed upon or clarified its values."

/s/ Candy Ashbrook
CANDY ASHBROOK

Subscribed and sworn to before me this 8th day of November, 1991.

/s/ Cynthia Ostrom
NOTARY PUBLIC for the State of Washington, residing at Everett.
My commission expires: 5/23/92
(seal)

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL (4)

Supreme Court, U.S.
FILED
DEC 16 1991
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1991

In re: James Blodgett — #91-716
Petitioner — Respondents objection to Amicas Brief

Comes now Charles Rodman Campbell the respondent in the above entitled cause and herein objects to this courts consideration of the Amicus curiae brief submitted by the snohomish county prosecuters office on November 25TH 1991 in this cause

1. This is a mandamus action and the snohomish county prosecuters have asserted that they represent the state of washington yet seek to include their complaints etc under the same cause of action as petitioner Blodgett. If the state of Wa. has a claim it must raise its own cause of action. Respondent has already asserted that Petitioner lacks standing. Accordingly the Amicus Brief is in conflict with petitioners cause of action

2. The Amicus Brief submitted is not appropriate to a mandamus cause of action and is not allowed. And if allowed was untimely filed

3. The snohomish county prosecutors office in submitting the Amicus Brief has knowingly misrepresented the issues its raised in an effort to gain personal recognition, favor of this court to consider the mandamus action and to deliberately prejudice respondent by submitting manufactured Affidavits as well as perjured Affidavits.

Specifically, The Snohomish County prosecutors named in the Amicus Brief have repetitively in the past drug respondents case through the media and have touted the victims family etc. to prejudice the actions pending in the courts for respondent by their improper attempts to generate adverse public pressure at the various times the court proceedings were taking place inorder to influence the courts actions which have been effective in prejudicing respondent. Second, the Affidavitts by the Ahlers were infact requested by the prosecutors. Furthermore, the facial language of the Ahlers Affidavitts clearly only seek vengence and plainly assert that their alleged healing can not begin until respondent is executed. The Ahlers are in N. Dakota and have lived their both prior to the murders in 1982 and since then. It is highly unlikely that they receive television coverage in N. Dakota of this case and and choose to parade themselves in the media in Washington State. Nor do the Ahlers live in fear that respondent will get them as they claim. Respondent has no connection to the Ahlers in any way nor has ever made any threats implied or otherwise toward them or to them.

In regard to the Candy Ashbrook Affidavitt respondent asserts that the Affidavitt was solicited by the prosecuting attorneys Further more Ms. Ashbrook has knowingly maligned respondent with perjured testimony in an effort

to further advance her own personal as well as organizational objectives. There is no evidence or factual data that supports the inference that respondents case was responcible for a 31% decrease in phone calls to the center in 1982 nor that respondents case is responcible for rapes being committed or for rapes not being reported. Further more ms. Ashbrooks statement detailing the alleged experiences of a woman alleged to have been raped in 1989 (Aff at pg. 22 #9) is a patently false and perjured statement. That woman does not exist, the alleged rape and threat never happened.

It needs to be pointed out that [redacted] ms. Ashbrook's Affidavitt reads like it was composed to aid the [redacted] prosecutors position. the Affidavitt does not substantiate the created issue in the prosecutors argument and [redacted] the prosecutors argument that respondents not being executed is the cause of all washingtons ills and is also because of the ninth circuits inaction is patently unethical and beyond ms Ashbrooks statements. This kind of creation of issues is dispicable

Finally, the prosecutors in their Amicus brief state that the original crime in 1974 against the victim Renae involved respondent in the course of the rape, [redacted] holding a

knife against the throat of renaes one year old daughter (Amicus brief pg.5.) this is a variation of the petitioners similar statement at pg. 4. in Petitioner's Brief for mandamas. Both statements are patently false and while in part is due initially because the washington supreme court made ~~[illegible]~~ a similar erroneous statement based on what respondents trial court said in the judges questionaire pursuant to RCW 10.95.120 in his death penalty proceedings the judges statement was falsely stated in that report and was infact created by the media. Respondent has informed all courts of that fact and the prosecutors and petitioners as well always use that statement for its prejudicial effect knowing that the 1976 trial transcripts of the 1974 crime clearly and unequivicably demonstrate that respondent never at any time was alleged to have held a knife to the throat of the child. The prosecutors office tried that case and as was also stated, fully aware from the record that that did not happen, so there is no denying their unethical use of false and prejudicial statement asserted knowingly by them for its prejudicial affect on this Court and the media

Conclusion this court should not accept the proposed Amicus brief.

dated this 10TH of December 1991

Charles Rodman Campbell
Respondent pro se
Po Box 520
Walla Walla Wa 99362

respondents objection to Amicus brief pg. 4.

SUPREME COURT OF THE UNITED STATES

IN RE JAMES BLODGETT, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY, ET AL.

ON PETITION FOR WRIT OF MANDAMUS

No. 91-716. Decided January 13, 1992

PER CURIAM.

The Court has before it a petition from the State of Washington for a writ of mandamus to the Court of Appeals for the Ninth Circuit. The petition seeks an order directing the Court of Appeals to issue its decision on an appeal from the District Court's denial of a second federal habeas petition in a capital case. The appeal was argued and submitted to the Court of Appeals on June 27, 1989, and no decision has been forthcoming.

Charles Rodman Campbell was convicted of multiple murders in 1982 in the State of Washington and sentenced to death. After his conviction was affirmed on direct appeal and we denied certiorari, *Campbell* v. *Washington*, 471 U.S. 1094 (1985), his first federal habeas petition was filed in July 1985 in the United States District Court for the Western District of Washington. Proceedings in that matter were completed when we denied certiorari in November 1988. *Campbell* v. *Kincheloe*, 488 U.S. 948. No relief was granted.

In March 1989 Campbell filed a second federal habeas petition in the same District Court. The court acted with commendable dispatch, holding a hearing and issuing a written opinion denying a stay or other relief within days after the second petition was filed. On March 28, 1989, Campbell appealed to the Ninth Circuit. The Court of Appeals granted an indefinite stay of execution and set a briefing schedule. The case was argued and submitted in

June 1989, but no decision was announced and the stay of execution remains in effect. The Washington Attorney General sent letters to the panel in April and October of 1990 inquiring about the status of the case, but neither letter was answered.

In January 1990 Campbell filed a motion to withdraw certain issues from consideration by the Ninth Circuit panel, and he renewed this motion in April. The panel took no action. In July 1990 Campbell filed his third state action for collateral relief, a personal restraint petition, with the Washington Supreme Court. In September, Campbell again moved the Court of Appeals to withdraw three issues from consideration in the case that it was still holding under submission, leaving eight others to be decided. The panel did not respond until by order of February 21, 1991, it noted Campbell's motion to withdraw the issues, requested a report on the status of the state court proceedings, and vacated its own submission of the case. Both Washington and Campbell responded that all of the issues pending before the Ninth Circuit had been exhausted. The State requested that the case be resubmitted, but the panel did not do so.

The Washington Supreme Court denied Campbell's third personal restraint petition on its merits on March 21, 1991. On June 10, 1991, Campbell filed a document advising the Court of Appeals panel that he desired to discharge his attorneys and proceed *pro se* and that he would file a third federal habeas petition in the District Court. At that point more than two years had passed since the Ninth Circuit had heard oral argument in the case. Almost two months later, on August 7, 1991, the panel granted the motion to relieve counsel, directed Campbell to file his third federal habeas petition by August 30, and announced its intention to wait for the District Court's ruling before taking further action. The District Court has set a briefing schedule for the third petition.

On October 25, 1991, the Washington Attorney General filed the mandamus petition now before us and on November 22 the Court of Appeals and the members of the panel

filed a response. Neither the response nor the record reveals any plausible explanation or reason for the panel's delay in resolving the case from June 1989 until July 1990. The response addresses the events after Campbell's third personal restraint petition was filed in the Washington Supreme Court. The response indicates that the panel vacated submission in February 1991 because if the Washington Supreme Court had granted the state petition, the appeal before the Ninth Circuit would have become moot. It further stated that the panel desired to avoid piecemeal appeals by awaiting the decision of the District Court on the third federal habeas petition. The response noted that the Ninth Circuit has formed a Death Penalty Task Force with the objective of eliminating successive habeas petitions and that the consolidation of the last two petitions is consistent with that objective.

The delay of over a year before the third personal restraint was filed in Washington state court remains unexplained, and was in fact compounded by the events that followed. The orders by the Ninth Circuit to vacate submission of the case until completion of the state collateral proceeding and then to hold the case in abeyance pending filing and resolution of the third federal habeas proceeding in the District Court raise the very concerns regarding delay that were part of the rationale for this Court's decisions in *Rose* v. *Lundy*, 455 U.S. 509 (1982) and *McCleskey* v. *Zant*, 499 U.S. ___ (1991). Adherence to those decisions, and their prompt enforcement by the district courts and courts of appeals, will obviate in many cases what the Court of Appeals here seems to perceive to be the necessity for accommodating multiple filings.

As to the Death Penalty Task Force, reports of joint committees of the bench and bar should be of urgent concern to all persons with the responsibility for the administration of justice in the Ninth Circuit, but the ordinary course of legal proceedings and the constant duty of all judges to discharge their duties with diligence and precision cannot be suspended to await its recommendations.

None of the reasons offered in the response dispels our concern that the State of Washington has sustained severe prejudice by the two-and-a-half year stay of execution. The stay has prevented Washington from exercising its sovereign power to enforce the criminal law, an interest we found of great weight in *McCleskey* when discussing the importance of finality in the context of federal habeas corpus proceedings. *Id.*, at ___ (slip op., at 22–23). Given the potential for prejudice to the State of Washington, the Ninth Circuit was under a duty to consider Cambell's claim for relief without delay. Our case law suggests that expedited review of this second habeas petition would have been proper. *Barefoot* v. *Estelle*, 463 U.S. 880, 895 (1983) ("Even where it cannot be concluded that a [successive habeas] petition should be dismissed under Rule 9(b), it would be proper for the district court to expedite consideration of the petition"). The delay in this case demonstrates the necessity for the rule that we now make explicit. In a capital case the grant of a stay of execution directed to a State by a federal court imposes on that court the concomitant duty to take all steps necessary to ensure a prompt resolution of the matter, consistent with its duty to give full and fair consideration to all of the issues presented in the case.

Despite our continuing concerns, we decline to issue mandamus to the Court of Appeals at this time. While there are grounds to question both the necessity and the propriety of the Ninth Circuit's order of August 7, 1991, *Campbell* v. *Blodgett*, 940 F.2d 549, the State did not file any objection to it. The State should have lodged its objection with the Court of Appeals, citing the cases it now cites to us. True, the State had taken some action. It wrote twice in 1990 to inquire about the status of the case. And after the panel's order vacating submission, the State objected and asked that the case be resubmitted for decision. The argument could be made that further requests for an expedited decision on the merits had little chance of success. But as a predicate for extraordinary relief, the State should have asked the Court of Appeals to

vacate or modify its order of August 7, 1991, before coming here. This Court's Rule 20.1 ("To justify the granting of any writ under that provision, it must be shown . . . that adequate relief cannot be obtained in any other form or from any other court").

As we do not now issue a writ of mandamus, the Court of Appeals should determine how best to expedite the appeal, given the present posture of the case. Denial of the writ is without prejudice to the right of the State to again seek mandamus relief or to request any other extraordinary relief by motion or petition if unnecessary delays or unwarranted stays occur in the panel's disposition of the matter. In view of the delay that has already occurred any further postponements or extensions of time will be subject to a most rigorous scrutiny in this Court if the State of Washington files a further and meritorious petition for relief.

The motion of respondent Charles R. Campbell for leave to proceed *in forma pauperis* is granted. The petition for writ of mandamus is

Denied.

SUPREME COURT OF THE UNITED STATES

IN RE JAMES BLODGETT, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY, ET AL.

ON PETITION FOR WRIT OF MANDAMUS

No. 91–716. Decided January 13, 1992

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, concurring in the judgment.

In recent years, the federal judiciary has done a magnificent job of handling a truly demanding appellate workload. On a national basis, the average time between notice of appeal and disposition is now less than 11 months. Although delays that are not fully justified occasionally occur, only in the most extraordinary circumstances would it be appropriate for this Court to issue a writ of mandamus to require a court of appeals to render its decision in a case under advisement.[1]

In its petition for a writ of mandamus, the State criticizes the Court of Appeals' failure to rule on the merits of Campbell's second habeas corpus petition, which was

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[1] "The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr* v. *United States District Court for Northern District of California*, 426 U.S. 394, 402 (1976); see also *Will* v. *United States*, 389 U.S. 90, 95 (1967); *Ex parte Fahey*, 332 U.S. 258, 259 (1947). Mandamus "has traditionally been used in the federal courts only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Will*, 389 U.S., at 95 (internal quotation omitted). Accordingly, we have required that the party seeking issuance of the writ have no other adequate means to attain the desired relief, and that he demonstrate that his "right to issuance of the writ is 'clear and indisputable.'" *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 384 (1953), quoting *United States* v. *Duell*, 172 U.S. 576, 582 (1899).

submitted in June 1989. In their response, the judges on the panel provide a completely satisfactory explanation for their July 1990 decision to defer ruling on the merits of the petition—namely, their desire to avoid piecemeal litigation and to address all of Campbell's claims in a single ruling. Because that explanation alone is sufficient to mandate denial of the State's petition, there was no occasion for the panel to explain its pre-July 1990 delay.

The panel's decision to defer its ruling on the second habeas petition pending disposition of the third personal restraint petition filed in the Washington Supreme Court in July 1990 showed proper respect for that court. Although this Court expresses its concern about the State's interest in expediting its execution of Campbell, the Court is notably silent about the fact that the Washington Supreme Court considered the claims Campbell raised in his third personal restraint petition to be substantial. Although the state court, over the dissent of Justice Utter, denied Campbell's petition, that court appointed counsel, scheduled briefing, heard oral argument, and addressed the merits of Campbell's several claims. On these facts, the Ninth Circuit's decision to delay its ruling on Campbell's second habeas petition was sound, for it enables that court to consider the entire case at one time and will not delay the ultimate disposition of the matter.[2]

Although I am sure the Court did not intend to send such a message, its opinion today may be read as an open invitation to petitions for mandamus from every State in which a federal court has stayed an execution. This is unfortunate because, as we noted in *Kerr* v. *United States District Court for Northern District of California*, 426 U.S.

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[2] On the facts of this case, the "severe prejudice" perceived by the Court is illusory. Even were we to direct the Ninth Circuit to decide Campbell's second petition, the State would still be required to wait until that court ruled on his third petition. The State seems to recognize as much, for it asks that we both direct the Ninth Circuit to decide the second habeas petition *and* vacate the August 7 order which permitted filing of the third habeas petition. Pet. for Writ of Mandamus 9.

394, 403 (1976), "particularly in an era of excessively crowded lower court dockets, it is in the interest of the fair and prompt administration of justice to discourage piecemeal litigation."

Moreover, as we have so frequently recognized, mandamus is disfavored because it has "the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants [appearing] before him." *Ex parte Fahey*, 332 U.S. 258, 260 (1947). Mandamus is an "extraordinary remed[y] reserved for really extraordinary causes," *ibid.*, precisely because of the great respect we have for our fellow jurists. This is not a situation in which the Ninth Circuit has unduly delayed decision of a case, but rather a situation in which that court has chosen to avoid repetitive and piecemeal litigation by consolidating two appeals. Respect for our fellow judges means providing them latitude in the handling of their burgeoning dockets, and granting due deference to those whose dockets are less discretionary than ours.

For the foregoing reasons, and because the State has failed to comply with this Court's Rule 20.1, I believe that the State's petition should have been denied summarily.